TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~5~~ 163

WILLIAM DOWNING, APPELLANT,

vs.

JAMES McCARTNEY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Dismissed -

FILED DECEMBER 14, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 375.

WILLIAM DOWNING, APPELLANT,

vs.

JAMES McCARTNEY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the Circuit Court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, on Saturday, the seventh day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-second year.

WM. H. BRADLEY, *Clerk.*

JOHN T. MANNY, GEORGE S. DRAKE and William Downing,
2 *vs.*
JAMES MCCARTNEY, GEORGE C. Smith, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farrell. } Chancery. Original bill.

And

GEORGE C. SMITH
vs.
JOHN T. MANNY, GEORGE S. DRAKE and William Downing. } Cross-bill.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

Be it remembered that, on the third day of June, in the year of our Lord one thousand eight hundred and sixty-four, came John T. Manny, George S. Drake, and William Downing, complainants, by Wm. C. Gondy, esq., their solicitor, and filed in said Circuit Court their bond for cost, and also at the same time their bill of complaint in said entitled cause, which said bond and bill are in the
3 words and figures following, to wit:

Circuit Court, July term, A. D. 1864.

Bond for costs.

JOHN T. MANNY *et al.*
vs.
JAMES MCCARTNEY *et al.* } In chancery.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss*:

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered, or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this third day of June, A. D. 1864.

GOUDY & CHANDLER.

Endorsed: Filed June 3rd, A. D. 1864 W. H. Bradley, clerk.

4 *Original bill.*

To the honorable the judges of the Circuit Court of the United States within and for the northern district of Illinois, in chancery sitting:

Your orators, John T. Manny, George S. Drake, and William Downing, citizens of the county of St. Louis and State of Missouri, humbly complaining showeth unto your honors, that on the first day of July, A. D. 1861, one Dennis Curran, and Sarah, his wife, sold to James McCartney, of the county of Cook and State of Illinois, (whom your orators pray may be made a party defendant to this bill,) the following described premises, to wit: Lot eleven in block sixty-one, in the school section, addition to the city of Chicago, situate in the county of Cook and State of Illinois, for the sum of three thousand and six hundred dollars, of which sum six hundred dollars were paid in cash, and the balance in three promissory notes, each bear-
5 ing date the first day of July, A. D. 1861, payable one, two and three years, respectively, after date, and each for the sum of one thousand dollars, with six per cent. per annum interest, payable annually.

And your orators further show unto your honors that the said James McCartney, in order to secure the payment of said promissory notes, with interest thereon, in manner aforesaid, duly executed a certain mortgage, bearing date the day and year aforesaid, and thereby did grant, bargain, sell and convey in fee simple unto the said Dennis Curran all the above-described property, situate in the county and State aforesaid; and it was provided that in case the said promissory notes, or either of them, or the interest thereon, were not paid at the time limited in said mortgage, the estate in the mortgage premises became absolute in law, which mortgage was duly delivered to said Dennis Curran, and recorded on the nineteenth day of August, A. D. 1861, in book 60, page 78, in the recorder's
6 office of Cook county, (all of which will more fully appear, as in and by said mortgage hereto attached marked "exhibit A," and which your orators pray may be made a part of this bill.)

Your orators further shew that on the second day of February, A. D. 1863, said James McCartney, in consideration of the sum of one hundred dollars in hand paid, sold to George C. Smith, of the county of Cook, and State of Illinois, (whom your orators pray may be made a party defendant to this bill,) the above-described premises, and covenanted to warrant and defend the same against all claims, except the mortgage above described.

Your orators further aver, that before and since the execution and recording of said indenture to said George C. Smith, and before and since the recording and execution of said above-described mort-
7 gage, several judgments operating as liens upon said mortgaged premises have been rendered against the said George C. Smith, as follows, to wit:

One on the law side of the Superior Court of Chicago, on the fifth day of November, A. D. 1857, for the sum of twelve hundred and six

dollars and costs, in favor of Frank M. Kerwin, of , whom your orators pray may be made a party defendant to this bill.

One on the law side of the Superior Court of Chicago, on the sixth day of November, A. D. 1857, for the sum of one thousand 83-100 dollars and costs, in favor of Edwin Blackman, executor of John High, jr., of the county of Cook, and State of Illinois, (and whom your orators pray may be made a party defendant to this bill.)

One on the law side of the Superior Court of Chicago, on the eleventh day of January, A. D. 1858, for the sum of one thousand and eighteen dollars, with costs of suit, in favor of Edwin Blackman,
8 executor of John High, jr., of the county of Cook, and State of Illinois.

One on the law side of the Circuit Court of Cook county, on the twelfth day of July, A. D. 1861, for the sum of two hundred and fifty 83-100 dollars, with costs of suit, in favor of Myron H. Norton and Charles A. Norton, of the county of Cook and State of Illinois. (whom your orators pray may be made party defendants to this bill.)

And your orators further shew unto your honors, that one of the notes above described has been paid to the said Dennis Curran by the said George C. Smith, for the benefits of the said James McCartney; and that said note is dated July first, A. D. 1861, for the sum of one thousand dollars, with six per cent. interest per annum, after date, and payable one year after date, but that the other two remain unpaid.

9 Your orators further show unto your honors, that the two above unpaid notes were afterwards, by endorsement thereon by the said Deunis Curran, without recourse on him, assigned to your orator, and the above-described mortgage transferred to them; and that thereby your orator became entitled to the payment of said promissory notes from the said James McCartney, and all the rights and security under the mortgage possessed by the said Dennis Curran; and that said sums of money in said notes, with a considerable arear of interest accrued thereon, is now due to your orators on the security of said mortgaged premises; and that your orators have frequently, in a friendly manner, applied to the said James McCartney and requested him to pay the same, which he, the said McCartney, refuses to do.

Your orators further show unto your honors that one Rod-
10 erick F. Farrell, of Chicago, in the State of Illinois, (whom your orators pray may be made a party defendant to this bill,) pretends to hold a prior mortgage upon above-described premises, and has commenced suit upon the same. Whereas your orators charge that said mortgage claimed by the said Roderick F. Farrell upon said above-described premises has long since been released, and satisfaction of the same been entered on record by one Edward Hand, to whom the said mortgage had been given to secure a promissory note of even date therewith, by the said Dennis Curran, in a consideration of the payment of the said note by a certain note dated March 15th, 1862, made by the said Dennis Curran payable to said Edward Hand.

In tender consideration whereof, and forasmuch as your orators have not a complete and safe remedy in the premises, at and by the strict rules of common law, nor can foreclose the equity of
11 redemption of the said mortgaged premises, or safely sell the same for the payment and satisfaction of the said principal and interest money so as aforesaid due to your orators on the said promissory notes and indenture of mortgage in manner aforesaid; to the end therefore that the said James McCartney, George C. Smith, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farwell, may be made parties defendants hereto, and may severally answer the matters and things hereinbefore stated as fully as if the same were herein again repeated, and they, and each of them, specially interrogated thereunto according to the best of their respective knowledge, information, remembrance or belief.

And that the said James McCartney may be decreed to pay
12 to your orators the said sums of money hereinbefore expressed and so due on said promissory notes and indenture of mortgage, hereinbefore mentioned and set forth as aforesaid, and all the interest now due and to grow due thereon, together with all your orator's costs and charges in this behalf sustained.

And in default thereof, that the said James McCartney, and all persons claiming, or to claim under him, may be foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and that all and singular the said mortgaged premises may, by the order and decree of this honorable court, be sold, and out of the money arising from the sale thereof your orators may be paid the full amount of principal and interest due to your orators, as aforesaid, together with all the costs sustained in this behalf.

And that your orators may have such other and further relief
13 in the premises as to your honors may seem proper, and shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orators the most gracious writs of subpœna of the United States of America, to be directed to the said James McCartney, George G. Smith, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farrell, therein and thereby commanding them, and each of them, on a certain day, and under a certain pain, personally to be and appear before your honors in this honorable court, then and there to answer all and singular the said premises, and to stand and abide by such order and decree therein as to your honors may seem meet, and shall be agreeable to equity and good conscience; and your orators will ever pray, &c.

W. C. GOUDY,
Ssolicitor for Complainants.

14 *Exhibit A.—Sale mortgage, McCartney to Curran.*

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and sixty-one, between James McCart-

ney, of Deerfield, in the county of Lake and State of Illinois, party of the first part, and Dennis Curran, of Chicago, State of Illinois, of the second part.

Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of three thousand dollars, ($3,000,) secured to be paid by three certain promissory notes, bearing even date herewith, payable to the order of Dennis Curran, in one, two, and three years respectively, and for the sum of one thousand doliars each, with interest at six per cent., payable annually, said notes and consideration thereof being for purchase money of said lots.

Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing of the payment of the
15 money aforesaid, with interest thereon, according to the tenor and effect of the said three promissory notes above-mentioned, and also in consideration of the further sum of one dollar paid him in hand by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, aliened and conveyed, and by these presents does grant, bargain, sell, remise, alien and convey the said party of the second part, his heirs and assigns forever, all the following described lot, piece or parcel of land situate in the county of Cook, State of Illinois, to wit: lot number eleven (11) in block number sixty-one, (61,) in the school section addition to the city of Chicago, being the same lot and premises this day sold and conveyed by the said Dennis Curran to the said James McCartney, and this mortgage is executed to secure notes given for purchase money of said lot above described, together with all
16 and singular the tenements, hereditaments, privileges and appurtenances thereto belonging, or in any wise appertaining, with the rents, issues and profits thereof, and all the estate, interest and claim whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed, to have and to hold the same, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators and assigns, and to their only proper use, benefit and behoof; provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the aforesaid sum of money, with such interest thereon at the time and in the manner specified in the above three promissory notes accord-
17 ing to the true intent and meaning thereof, then these presents and everything herein expressed shall be absolutely null and void.

But in case of the default in the payment of the said notes above mentioned, or any or either of them, or the interest thereon, or any part thereof, according to the tenor and effect thereof, the said party of the second part, or his legal representatives or attorney, shall have the right at his, her or their option, to declare the whole sum hereby secured due and payable, after having advertised such sale

thirty (30) days in a newspaper published in the said county of Cook, may sell the said premises, or any part thereof, and all rights and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns therein, at public vendue, to the highest bidder for cash, at the place and at the time appointed in such advertisement, or may adjourn the sale from time to time at discretion.

And upon the making of such sale or sales shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold; and shall apply the proceeds of sale to the payment of: (1) expenses for advertising, selling and conveying as aforesaid, including attorney's fees; and (2) the amount due on said notes; (3) rendering the overplus, if any, to the said party of the first part, or to his assigns or legal representatives.

In witness whereof the said party of the first part hereuntó sets his hand and seal the day and year above written.

[SEAL.] JAMES McCARTNEY.

Signed, sealed and delivered in presence of—
P. S. SHERMAN.

STATE OF ILLINOIS, *Cook County, ss:*

I, D. P. Wilder, a notary public in and for the city of Chicago, in said county, in the State aforesaid, do hereby certify that James McCartney, who is personally known to me as the real person whose name is subscribed to the above mortgage, appeared before me this day in person, and acknowledged that he executed and delivered the said mortgage as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this first day of July, in the year of our Lord one thousand eight hundred and sixty-one.

[SEAL.] D. P. WILDER,
Notary Public.

$1,000 CHICAGO, *July 1st*, 1861.

Three years after date I promise to pay to the order of Dennis Curran one thousand dollars, with interest at six per cent. per annum, payable annually, value received.

JAMES McCARTNEY.

Pay the within note to Manny, Drake & Downing, for value received, without recourse on me.

DENNIS CURRAN.

The other note and endorsement thereon precisely the same as the above, except the note is to be paid two years after date.

Endorsed: Filed June 3d, 1864. Wm. H. Bradley, cl'k.

21 And on the same day, to wit, on the third day of June, in the year A. D. 1864, the said complainants, by their solicitor, sued out of said court a subpœna on their said bill to the defendants, which, together with the marshal's return thereon, are in the words and figures following to wit:

Subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to James McCartney, George C. Smith, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farwell, greeting:

We command you, and every of you, that you appear before our judge of our Circuit Court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of July next, to answer the bill of complaint of John L. Manny, George S. Drake and William Downing, this day filed
22 in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this third day of June, in the year of our Lord one thousand eight hundred and sixty-four and of our independence the eighty-eighth.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50-cts.rev. stamp, cancelled.]

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which
23 the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that I have appointed and by these presents do appoint Spencer B. Webb my true and lawful deputy to execute the annexed writ, (John L. Manny et al. vs. James McCartney et al.,) and to make true return thereon, according to law.

[SEAL.] J. R. JONES,
United States Marshal of the Northern District of Illinois.

I hereby certify that I did, on the 4th day of June, A. D. 1864, serve the within subpœna upon James McCartney, Edwin Blackman, Myron H. Norton and George C. Smith, therein named in manner following, to wit: upon the said Edwin Blackman and
24 Myron H. Norton by delivering a true copy thereof to each personally; and upon the said James McCartney by leaving a true copy thereof at his usual place of abode with Ellen McCartney, his wife, and informing her of the contents thereof, she being a free white person and a member of the family of the said James McCartney, and of more than ten years of age; and upon the said George C. Smith by leaving a true copy thereof at his usual place of abode with Serine Johnson, and informing her of the contents thereof, she being a free white person and a member of the family of the said George C. Smith, and of more than eighteen years of age; and I further certify that I have not served the said supœna on Frank M. Kerwin, Charles A. Norton and Roderick F. Farwell, therein also named, not having found them in my district.

J. R. JONES, *U. S. Marshal*,
By SPENCER B. WEBB,
Special Deputy.

Marshal's fees.

4 services		8 00
4 copies		2 00
12 miles		12
		10 12

Endorsed: Filed June 22d, A. D. 1864. Wm. H. Bradly, clerk.

25 On this day to wit, the 21st day of June, A. D. 1864, in the record of the proceedings of said court in chancery in said entitled cause is the following entry, to wit:

Leave to amend bill, &c., by correcting name of one of the def'ts.

JOHN T. MANNY, GEORGE S. DRAKE AND WILLIAM DOWNING	
vs.	
JAMES MCCARTNEY, GEORGE C. SMITH, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farrell.	Chancery.

On motion of the complainants' solicitor leave is granted them to amend their bill and process by correcting the name of one of the defendants.

On this day, June 27th, A. D. 1864, an alias writ of subpœna

issued out of the office of the clerk of said court in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Alias subpœna.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to James McCartney, George
26 C. Smith, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farrell, greeting:

We command you and every of you again that you appear before our judges of our Circuit Court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of August next, to answer the bill of complaint of John L. Manny, George S. Drake and William Downing, filed June 3d, 1864, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50-c. revenue stamp cancelled.]

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office
27 of said court at Chicago aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have not served the within subpœna upon Frank M. Kerwin and Roderick F. Farrell or either of them, not being able to find them or either of them in my district.

J. R. JONES, *U. S. Marshal,*
By A. B. COTES, *Deputy.*

Endorsed: Filed Aug't 1st, A. D. 1864. Wm. H. Bradley, Clerk.

On this day, to wit, July 9th, A. D. 1864, came defendant, George C. Smith, by his solicitors, and filed in said clerk's office his apperance in said cause, which said appearance is the words and figures following, to wit:

In the Circuit Court of the United States, July term, 1864.

Appearance of G. C. Smith.

JOHN L. MANNY *et al.*
vs.
JAMES MCCARTNEY, GEORGE C. SMITH *et al.*

Now this day comes the said defendant, George C. Smith, impleaded, &c., by Wilson & Asay, his counsel, and enters his appearance herein.

Chicago, July 9, 1864.

WILSON & ASAY,
Sol. for def't, G. C. Smith.

Endorsed: Filed July 9, 1864. Wm. H. Bradley, , cl'k.

28 And afterwards, to wit, on the 5th day of October, A. D. 1864. thesaid George C. Smith, by Wilson & Asay, his solicitors, filed in said court with the clerk thereof his answer to the said complainants' bill of complaint, in the words and figures following, to wit:

Circuit Court of the United States within and for the northern district of Illinois.—In chancery.

Ans. of G. C. Smith to original bill.

JOHN T. MANNY AND GEORGE S. DRAKE
vs.
JAMES MCCARTY, GEORGE C. SMITH, Frank M. Currin, Edwin Blackman, Myrson H. Norton, Charles A. Norton and Roderick F. Farwell.

UNITED STATES OF AMERICA,
State of Illinios, Cook County, ss:

The answer of defendant George C. Smith.

29 This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer thereto, this defendant answering saith, that he admits that the premises described in the complainant's bill were sold and conveyed to the defendant, James McCarty, by defendant, Dennis Currin and wife, as charged in said bill, and that said McCarty, at said time in said bill specified, made, executed and de-

livered to said Currin the notes for three thousand dollars, and to secure the same the mortgage specified in said bill, and that the first of said three notes has been paid; and this defendant says that according to his knowledge, remembrance, information and belief, that there was in truth and in fact no valid consideration for said three thousand dollar notes and the said mortgage to secure
30 the same, but that, as this defendant is informed and believes, the said notes and mortgage were given by said McCarty without any valid consideration.

And this defendant for further answer says, that when said defendant, James McCarty, sold the said premises in said bill specified to this defendant, said defendant, McCarty, gave this defendant to understand and be informed (and such this defendant verily believed to be true) that there was no other incumbrance on said premises, at least beside and except the said money claimed and pretended to be due, as secured by said mortgage from said McCarty to said Currin, and that though there had been the prior mortgage, as specified in said bill, yet this defendant verily believed the same had been fully satisfied and discharged.

And defendant for further answer says, that at the time of the said sale by said McCarty to this defendant, there was in fact a prior mortgage upon said premises, to wit: a mortgage made, executed, duly acknowledged and delivered by defendant, Dennis Currin, to one Edward Hand, on the 31st day of August, A. D. 1859, which said mortgage was duly recorded in the recorder's office
31 [office] of the said county of Cook on the 12th day of September, A. D. 1859, in book 48 of mortgages, at page 125, which said mortgage was given to secure the payment of a note for six hundred dollars of the same date, made, executed and delivered by said Currin to said Hand, payable to the order of said Hand one year after the date thereof, with interest at ten per cent., which mortgage this defendant prays leave to present and prove on the hearing of this cause, and which mortgage and note is now due and unpaid in full, except the interest from the date thereof to the 15th day of March, A. D. 1862, and is now a lien and incumbrance upon the said premises so purchased by this defendant of defendant, McCarty, as hereinbefore specified.

And this defendant denies that said note was ever paid, or that said mortgage was ever discharged, satisfied, or cancelled by the said Hand, or by any other person authorized so to do.

And this defendant says that on said 15th day of March,
32 1862, when the said note was delivered up to the said Currin, as alleged in the complaint's bill, and another note of said Currin taken instead, it was expressly agreed and understood by and between the said Hand and the said Currin that the same was in nowise to be or considered as payment of said first-mentioned note, and that the said exchange of notes was in no manner to satisfy or discharge the said mortgage, but that the same was to be in full force and effect.

And this defendant further says that the release and discharge of

said mortgage upon the record purporting to be executed by the said Hand, as specified in complainant's bill, was a forgery; that the same was not made or executed by the said Hand, or by his request or authority, but utterly without his knowledge or consent.

And this defendant for fur answer says, that after the
33 execution of said mortgage and the recording of the same as aforesaid, the same was duly and for good and valuable consideration transferred and assigned by said Hand to one Farewell, being the same Roderick F. Farwell made defendant in complainant's bill.

And this defendant for further answer says, that after the transfer and assignment, as aforesaid, of said mortgage to said Farwell, he instituted a suit in the Recorder's Court, in the city of Chicago, on the chancery side thereof, at the April term thereof, A. D. 1864, against defendant, Dennis Currin. And this defendant for the purpose, and praying for the cancelling of the said pretended release and discharge of the said mortgage, on the ground and for the reason of the fraud and forgery as aforesaid; and that the said mortgage be held valid and of full force and effect, which said Recorder's Court had then and there full jurisdiction of the said parties and the subject-matter of said suit-

34 And this defendant for further answer says, that afterwards and upon a full hearing and trial upon the merits of said cause the said Recorder's Court on the 30th day of June, A. D. 1864, which was one of the days of the June term of said court, it was found ordered and decreed by said court, among other things, that the note hereinbefore specified as given on the 15th d'y of March, A. D. 1862, was substituted for the note hereinbefore specified as made on the 31st day of August, A. D. 1859, and that the said note so given March 15th, 1862, was to remain secured by the mortgage hereinbefore specified as executed on said 31st d'y of August, A. D. 1859, the same as and instead of the note mentioned in said mortgage as executed August 31st, 1859, and that release and satisfaction of said mortgage, as hereinbefore specified and mentioned in the complainant's bill in this cause, is false, forged and counterfeit, and in no
35 way or manner made or executed by the said Edward Hand, or by his knowledge, consent or authority, and that the said release and satisfaction is null and void, and that the said substituted note and mortgage have not been paid, cancelled, released or discharged.

And it was by said court then and there further found, ordered, adjudged and decreed that the right, title and interest of the said defendant, George C. Smith, (this defendant,) in and to the said real estate being the same specified in the complainants' bill, is subject to the lien of said mortgage and the right of said complainant, Farwell. All which proceedings, finding, order and decree this defendant prays leave to present and prove upon the hearing of this cause.

And this defendant for further answer says, that the consideration for the assignment and transfer of the notes and mortgage from the defendant McCarty to defendant Currin by said defendant Currin

36 to the complainants in this action, as specified in complainants' bill, was, as this defendant is informed and believes, and as he states upon information and belief, an old indebtedness from said defendant Currin to said complainant, and not otherwise, and that such assignment and transfer was after the second of said three one thousand dollar notes became due and payable, and that the complainant at that time was fully notified and informed of all the rights and equities between the original parties to wit, defendants McCarty and Currin.

And this defendant further answering says, that on the 2nd day of February, A. D. 1863, at the time the premises mentioned in complainants' bill were conveyed by defendant McCarty to this defendant it was agreed by and on the part of defendant Currin that
37 Bradner, Smith & Co., this defendant being one of said firm, pay the three thousand dollars given by said McCarty to defendant Curran, and specified in complainants' bill as sold and assigned to the complainant by said Currin in wrapping or other paper, as should be ordered by said Curran from time to time, said paper to be and compare in all respects in quality, size and price with the sample delivered to said Curran on that day, to wit, February 2d, A. D. 1863, the price being thereon marked by said Bradner Smith & Company, and that the same be endorsed on the notes aforesaid, said paper to be delivered at the store of said Bradner, Smith & Co., in Chicago, upon the orders of said Currin; and it was further agreed that all of said paper should be so ordered within ninety days from that date; and this defendant says that said Currin did so order such
38 paper within said ninety days to the amount and of the value of sixteen hundred dollars, leaving due upon said three notes only about the sum of fourteen hundred dollars; and it was on said 2d d'y of Febuary, A. D. 1863, further agreed by said Currin that he would not have the right to order any kind of paper at any one time in larger quantities than Bradner, Smith and Company should have on hand at the time of receiving such order or orders.

And this defendant further answering says, that during said ninety days said Bradner, Smith and Company had at all times on hand kinds and quality of paper required to answer such orders and pay said notes in full, but that said Currin did not during said ninety days, nor has he or any other person or persons since that time, demanded or ordered the balance of paper to pay said three notes in full; and this defendant says, that had said paper been so ordered ninety days, or at any reasonable time since, said Bradner, Smith & Co. were ready and would have filled said order or orders to the
39 full am'nt of said three notes, deducting therefrom the am'nt of the encumbrance upon said premises as created and existing by virtue of the said mortgage to said Hand, as hereinbefore described, or said Bradner, Smith & Co., would have during any of said time paid said notes in full as aforesaid, in case the said lien and encumbrance had been in any legal manner removed or satisfied; and that this defendant and said Bradner, Smith & Company have at all times been and now are ready and able to fill such order or orders to the full satisfaction of said notes.

And this defendant further says, that said Currin did not endorse the paper he did so receive upon said order upon said notes at the time he received said paper, as he had agreed to do; all which agreement, facts and circumstances the complainants in this cause had notice of at the time of the pretended transfer of said notes and mortgage to them by said Currin, as alleged in their said bill; and this defendant denies that there is now due upon said notes
40 two thousand dollars, and denies that the plt'fs have any claim whatever by virtue of the mortgage made originally to secure said notes, but that whether there is due upon said notes is due upon the aforesaid agreement to take paper for the same, as hereinbefore stated; and this defendant insists and claims that the plaintiffs in this cause have no claim whatever upon the premises described in this bill, and that such claim which said Currin originally had was by him relinquished and abandoned, in consideration the said three thousand dollars be paid in ninety days from Feb. 2d, 1863, and long before the lease became due by the original contract; and if the whole has not been paid it in nowise the fault of Bradner, Smith & Co., or ~~this~~ defendant, or defendant McCarty, but wholly the neglect and fault of said Currin, and that said Currin having assigned said notes to the complainants after the same were due, that said
41 complainants had due notice of all such fault and neglect, and the rights and equities of this defendant, and are answerable for the same, the same as though said notes had not been assigned, and this proceeding had been in the name and interest of said Currin, and that the premises should not be sold to satisfy said claim, but that the complainants should be left to persue their remedy upon the contract aforesaid, made February 2, 1863.

And this defendant, for the reasons and under the circumstances aforesaid, is advised and insists that the said complainants are not entitled to the relief they pray for in their said bill, and that said premises should in nowise be held or disposed of to satisfy their demand, and that this defendant should in nowise be individually held liable for the payment of the same: and this defendant further prays and insists that his just and equitable rights in the premises
42 should be protected by this court.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in the complainants' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

GEO. C. SMITH.
WILSON & ASAY,
Atty's for Def't.

Endorsed: Filed Oct. 5th, 1864. Wm. H. Bradley, cl'k.

43 *Leave to file amended bill.*

On this day, to wit, the 26th day of July, A. D. 1865, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

JOHN L. MANNY *et al.*
vs.
JAMES MCCARTNEY *et al.* } Chancery.

On motion of the complainants' solicitor, leave is given by the court to file an amended bill.

44 And afterwards, to wit, on the 26th day of July, A. D. 1865, the said complainnants, by Gondy & Chandler, their solicitors, filed in said court their amended bill in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois.

Amended bill.

JOHN T. MANNY *& al.*
vs.
JAMES MCCARTNEY *& al.* } In chancery.

To the honorable judges of the Circuit Court of the United States for the northern district of Illinois, in chancery sitting:

Humbly complaining, shew unto your honors your orators John T. Manny, George L. Drake and William Downing, partners in business under the firm-name and style of Manny, Drake & Downing, who are citizens of the State of Missouri, by way of amendment to their original bill filed in this cause; that on or about the first day of July, A. D. 1861, James McCartney, who is a citizen of the State of Illinois, became and was indebted to one Dennis Curran in the sum of three thousand dollars, and for the purpose of securing the
45 payment of said sum of money the said McCartney executed and delivered to said Dennis Curran his three several promissory notes, each bearing date the first day of July, A. D. 1861, and each for the sum of one thousand dollars, payable to the order of said Curran—one payable in one year from date, one in two years from date, and one in three years from date, with interest at six per cent.; and that for the purpose of securing the payment of said several promissory notes, and for the further consideration of one dollar, the said McCartney executed and delivered to the said Curran a deed of mortgage, dated the day and year last aforesaid, in and by which said deed of mortgage the said McCartney conveyed to the said Curran, his heirs and assigns, the following described lot or parcel of land situated in the county of Cook and State of Illinois, to wit: Lot numbered eleven, (11,) in block numbered sixty-one, (61.) in the school section addition to the city of Chicago, (of which said premises the

said McCartney was then or pretended to be seized in fee simple,) together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto appertaining, and all of the estate, interest and claim whatsoever of the said McCartney, in law or equity, in and to said premises; to have and to hold the
46 same, with the appurtenances unto the said Curran, his heirs, executors, administrators and assigns, to their only proper use and benefit: provided always, and the said deed of mortgage was upon this express condition, that if the said McCartney, his heirs, executors, administrators and assigns should well and truly pay, or cause to be paid, to the said Curran, his heirs, executors, administrators and assigns the aforesaid sum of money, with the interest thereon, at the time and in the manner specified in said several promissory notes, then said deed of mortgage should be absolutely null and void; but in case of default in the payment of said promissory notes when due, or either or any of them, then in and by said deed of mortgage power was given to said Curran or his legal representatives to sell said premises, or any part thereof, and all the right and equity of redemption of said McCartney, his heirs, executors, administrators and assigns therein, at public vendue, after having first given 30 days' notice of the time and place of such sale in a newspaper published in said Cook county, and apply the proceeds thereof to the payment of said indebtedness, rendering the surplus, if any, to the said McCartney or his assigns or legal representatives,
47 as in and by the said deed of mortgage ready to be produced and proven by your orators, reference thereunto being had, will more fully and at large appear.

And your orators further shew that said deed of mortgage was duly acknowledged and recorded on the 19th day of August, A. D. 1861, in book 60, page 78 of the land records of Cook county aforesaid.

And your orators further shew unto your honors that after the execution and delivery of said notes and mortgage, and before the two of said notes payable respectively in two and three years from date had become due and payable, the said Dennis Curran, for a valuable consideration, assigned and transferred the said two last-mentioned promissory notes to your orators, whereby your orators became the owners thereof and entitled to have the principal sums and interest thereof paid to them by the said McCartney when they should become due and payable, and entitled to the benefit of said deed of mortgage to secure and enforce the payment of said two promissory notes.

And your orators further show that the said last-mentioned promissory notes, though both of them were long since due and payable, have not been paid by said McCartney, or by any one for him, to said Curran or to your orators; neither has either one of them,
48 nor any part thereof, nor the interest due them, or any part thereof, been so paid to said Curran or to your orators, but the same and both of them, and the said sums of money mentioned therein, and the interest thereon, still remain due and unpaid to

your orators, and in no part paid or in any way satisfied, by means of which said several premises your orators have become entitled to have all the estate, right, title and interest of the said McCartney at the date of said mortgage in and to said described premises sold, and all his right and equity of redemption forever barred and foreclosed, and the proceeds of such sale applied to the payment and satisfaction of said promissory notes so held and owned by your orators.

And your orators further show that the following named persons, whom your orators pray may be made defendants hereto, to wit, George C. Smith, Frank McKerwin, Edwin Blackman, Myron H. Norton and Charles A. Norton, respectively, and each for himself, claim to have interest in lien or claim upon said mortgaged premises; but your orators charge that such pretended interests, liens and claims are subsequent and subservient to the lien of your orators by virtue of said mortgage.

And your orators well hoped that the said McCartney would
49 have paid to your orators such principal sums of money and the interest thereon, so due to your orators upon said two promissory notes and said deed of mortgage, as your orators have often requested him to do, and as in equity and good conscience he ought to have done; but now so it is, may it please your honors, that the said McCartney, combining and confederating with divers other persons, &c., to defraud and injure your orators in the premises, sometimes pretends and gives out in speeches that your orators cannot dispose of the said premises so any purchaser in any manner, and that the same will be subject to an equity of redemption; and at other times he pretends that the said principal sums so due to your orators as aforesaid, and the interest thereon, have been paid and discharged, and that thereby the said notes have been paid and said mortgage has become null and void; all which actings and doings of the said McCartney and his confederates are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

In tender consideration whereof, and inasmuch as your orators are remediless by the strict rules of the common law, and can only have adequate relief in a court of equity, where such matters are properly cognizable.

To the end, therefore, that the said James McCartney,
50 George C. Smith, Frank McKerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton, and their confederates when discovered, may without oath (their respective oaths being hereby expressly waived) full, true and perfect answer make to all and singular the said premises according to the best of their knowledge, information or belief, and that the said James McCartney be decreed to pay to your orators the said principal sums of two thousand dollars so due upon said two promissory notes hereinbefore mentioned as aforesaid, and all the interest money now due or to become due thereon, together with all your orators' costs and charges in this behalf sustained, by a short day to be appointed by this honorable court; and in default thereof that the said James McCartney, and all

persons claiming or to claim under him, may be foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part and parcel thereof, and that all and singular the said mortgaged premises, with the appurtenances, may, by the order and decree of this honorable court, be sold, and out of the money arising from the sale there of your orators may be paid the full amount of said principal sum of two thousand dollars hereinbefore mentioned, and so due to your orators on said two promissory notes as aforesaid, and all the interest money due or to become
51 due thereon, together with all your orators' costs and charges in this behalf sustained; and that your orators may have such other and further relief in the premises as to your honors may seem proper and shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orators a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to said defendants, thereby commanding them to be and appear before this honorable court on a day certain, then and there to answer the said premises, and abide by such order and decree therein as to your honors shall seem meet.

And your orators will ever pray &c.

GOUDY & CHANDLER,
Solicitors for Complainants.

Endorsed: Filed July 26th, 1865. Wm. H. Bradley, cl'k.

52 And afterwards, to wit, on the second day of October, A. D. 1865, the said defendant, George C. Smith, by his solicitors, filed in the clerk's office of said court his answer to the amended bill of the complainants, in the words and figures following, to wit:

Ans. of G. C. Smith to amended bill.

JOHN T. MANNY *et al.*
vs.
JAMES MCCARTNEY *et al.* } In chancery.

UNITED STATES CIRCUIT COURT, *Northern District of Illinois, ss:*

The answer of George C. Smith, one of the defendants to the said complainants' amended bill of complaint:

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the complainants' said amended bill of com-
53 plaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer to, this defendant, answering, saith, that he admits that the premises described in the complainants' amended bill were sold and conveyed to the defendant, James McCartney, by defendant, Dennis Currin and wife, as charged

in said amended bill, and that said McCartney at said time in said bill specified, made and executed, and delivered to said Currin, the notes for three thousand dollars, and to secure the same mortgage, specified in said amended bill of complaint, and that the first of said notes has been paid. And this defendant says that, according to his knowledge and belief, remembrance and information, that there was in truth and in fact no valid consideration for said three thou-
sand dollar notes, and the said mortgage to secure the same,
54 but that, as this defendant is informed and believes, the said
notes and mortgage were given by said McCartney without and valid consideration.

And this defendant, upon his knowledge and belief, admits that two of said notes were transferred and assigned by said Curran to the complainants, but whether said mortgage was so assigned this defendant is of his own knowledge unable to say, but is ignorant.

And this defendant, further answering, saith that said defendant, James McCartney, on or about the second day of February, A. D. 1863, sold and conveyed said premises in said amended bill specified for a valid consideration to this defendant, and that said McCartney then gave this defendant to understand and be informed (and such this defendant verily believed to bé true) that there was no other lien or incumbrance then upon said premises, at least beside and
except the said money alleged and claimed to be due as secured
55 by said mortgage from said McCartney to said Curran, and
that though there had been a prior mortgage upon said premises, yet this defendant then verily believed that the same had been satisfied and discharged.

And this defendant, further answering, saith that at the time of the sale by said McCartney to this defendant there was in fact a prior mortgage on said premises, to wit: a mortgage made, executed and duly acknowledged and delivered by said Curran to one Edward Hand, on the thirty-first day of August, A. D., 1859, which said mortgage was duly recorded in the recorder's office for the county of Cook, State of Illinois, in book 48 of mortgages, page 125, and which mortgage was given to secure the payment of a note for six hundred dollars made, executed and delivered by said Curran to said Hand, payable to the order of said Hand one year from date
thereof, with interest at ten per cent., and which said mort-
56 gage this defendant prays leave to prevent and prove on the
bearing of this case, and which said mortgage and note remained due and unpaid until payment of the same by this defendant, as hereinafter more fully set forth and specified, and which said mortgage always has been, and still is, a lien and valid incumbrance upon said premises. And this defendant denies that said note and mortgage was ever paid and discharged by said Curran or any other person for or in his behalf.

And this defendant, further answering, saith that on the 15th day of March, 1862, said original note for $600 was delivered up to said Curran, and another note of said Curran taken instead, and that it was then expressly agreed and understood by and between the said

Hand and the said Curran that the same was in no wise to be
57 considered as payment of said first-mentioned note for $600, and that said exchange of notes was in no manner to satisfy or discharge the said mortgage given to secure the same, but that the same was to be and remain in full force and effect.

And this defendant further saith that upon the records of mortgages for said county and State there appears a writing purporting to be a release and discharge of said mortgage, which discharge and release purports to be signed by said Hand, and this defendant upon his personal knowledge and belief saith, that said writing so purporting to be a discharge of said mortgage is a forgery, and that the same was not made by said Hand or by his request or authority, but utterly without his knowledge and consent, and this defendant
58 denies that said mortgage has ever been paid or discharged except as hereinafter specified.

And this defendant further answering saith, that after the execution of said note and mortgage, the same was for a good and valuable consideration transferred and assigned by said Hand to one Roderick F. Farrell, one of the defendants to this suit.

And this defendant for further answer saith, that after the transfer and assignment as aforesaid of said mortgage to said Farrell, he instituted a suit in the Recorder's Court of the city of Chicago, on the chancery side thereof, at the April term thereof, A. D. 1864, against defendant Curran and this defendant, for the purpose and praying for the canceling of the said fraudulent release and discharge of the said mortgage, on the ground and for the reason of the fraud
59 and forgery aforesaid, and that the said mortgage be held valid and in full force and effect, and prayed for a foreclosure of the same, which said recorder's court then and there had full jurisdiction of the parties and the subject-matter of said suit.

And this defendant further answering saith, that afterwards and upon a full hearing and trial of the merits of said case, the said Recorder's Court, on the 30th day of June, 1864, which was one of the days of the June term of said court, it was found, ordered and decreed by said court, that the note of June 15th, A. D. 1862, hereinbefore specified, was substituted for the note of Aug. 31, 1859, hereinbefore specified, and that said note of June 15th was to remain secured by the mortgage hereinbefore specified as executed on the 31st day of August, A. D. 1859, the same as and instead
60 of the note mentioned in said mortgage as executed August 31, 1859, and that said pretended release and discharge hereinbefore mentioned was false, forged and counterfeit, and in no way or manner made or executed by said Hand, or by his consent, or with his knowledge, or by his authority, and that said release was null, void and of no effect, and that said substituted note and the mortgage securing the same had not been paid, cancelled, release and discharged. And said court then and there granted the prayer of said Farrell, and found that there was due on said note and mortgage the sum of six hundred and forty-seven dollars and ninety cents, ($647 90;) and said court adjudged and decreed that the right, title

and interest of this defendant, George C. Smith, in and to the
61 said real estate, being the same specified in the complainants' amended and original bill of complaint, was subject to and subservient to the lien of said mortgage and the rights of said complainant Ferrell, and said court ordered said premises to be sold, all which findings, proceedings, orders and decree, this defendant prays leave to present and prove upon the hearing of this cause.

And this defendant further answering saith, that in pursuance of the order, decree and finding of said Recorder's Court, one John Woodbridge, esq., was appointed a special master in chancery, with directions to sell the real estate described in said Farrell's bill of complaint, said real estate being the same specified in complainants' amended bill.

62 And that in pursuance of such decretal order said Woodbridge, as such master, advertised said mortgaged premises for sale on Thursday, the first day of September, 1864, he first having given notice of such intended sale for more than 20 successive days before said 1st day of September, by publication of the same, setting forth that said real estate would then and there be sold at public auction to the highest bidder, for cash; and at the time and place aforesaid said Woodbridge, as such master, offered said mortgaged premises (being the same specified in complainant bill) for sale at public auction to the highest bidder, for cash. And thereupon said Roderick Farrell bid thereon the sum of seven hundred and fourteen dollars and forty-four cents, ($714 44,) that being the highest and best bid for the said premises. The same were fairly struck off and sold to said Farrell at said price; and said master then
63 and there gave to said Farrell a certificate of sale of said premises, containing, among other things, that unless said premises were redeemed on or before the second day of December, A. D. 1865, said Farrell would be entitled to a deed for said premises.

And for further answer this defendant says, upon his personal knowledge and belief, that, after such sale of said real estate to said Farrell by said Woodbridge, as such master, as aforesaid, and the execution and delivery of such certificate of sale to him, the said Farrell, he, the said Farrell, transferred and assigned all his right, title and interest in such certificate of sale to the complainants; but whether for a good and valuable consideration this defendant of his own knowledge is unable to say, but is ignorant; but prays that said complainants may disclose what consideration, if any,
64 they paid said Farrell, or any one, for the transfer and [and] assignment to them of said certificate.

And this defendant for further answer saith, that after such sale, and the execution and delivery of said certificate of sale, as aforesaid, and before the expiration of the time in which said real estate (being the same mentioned in complainants' bill) was to be redeemed, if at all, he being the owner of the fee in said premises, as such owner of the fee redeemed said real estate from said sale by paying to said Woodbridge, as such master, the sum of seven hundred and

ninety-two dollars and forty-eight cents, that being the full amount of what said premises were sold for, together with the costs accruing from the sale of said real estate; and said Woodbridge thereupon executed and delivered to this defendant the certificate of redemption, stating that he had redeemed said real estate from said
65 sale, and also stating therein the amount paid by said George C. Smith.

This defendant, for such redemption, and which said certificate is recorded in the register office for said county of Cook, and which said certificate this defendant humbly prays to present and prove on the hearing of this cause, as also the said certificate of sale hereinbefore mentioned.

And this defendant, further answering, saith and humbly shows unto this honorable court, that by redeeming said real estate from said sale, made by said master, he became entitled to the payment of said sum so paid by him for such redemption, and that he is equitably entitled to the benefit of said mortgage so originally given by said Curran to said Hand, and that in equity and good conscience he ought to be allowed and permitted to hold said mortgage
66 as a lien and incumbrance prior to the complaints upon said premises, until he is reimbursed and repaid for such sum as he paid to redeem from said sale, and also for his expenses in that behalf sustained, said mortgage being a prior legal and existing claim and lien upon the same premises, as in said complainant's amended bill specified, and being executed, delivered and recorded before the said mortgage, given to said Curran by said McCartney, and by Curran assigned and transferred to the complainant, as in said bill specified, and never having been discharged or satisfied except by this defendant, as hereinbefore stated; this defendant never meaning or intending to discharge and forever extinguish the same, or to release said premises therefrom.

And this defendant further says, and gives this honorable
67 court to understand and be informed, that upon his knowledge, information and belief, at the time of the redemption of said real estate by him from said sale so made by said master, as hereinbefore specified, said complainants were the owners of said certificate of sale given by said John Woodbridge, esq., to said Farrell, the same having been, as before stated, transferred and assigned to them; but whether in good faith, or for a valid consideration, this defendant knoweth not. And that the complainants have received the benefit of the money so paid by this defendant to redeem said premises from said sale. And this defendant, further answering, saith that the consideration for the assignment and transfer of the notes and mortgage from the defendant, McCartney, to Curran, by said Curran to the complainant in this cause, as specified in complainants' amended bill, was, as this defendant is informed and believes,
68 and as he states upon his information and belif, an old indebtedness from said defendant, Curran, to said complainants, and not otherwise, and that such assignment and transfer was made after the second of said three one thousand dollar notes became due and

payable, and that the complainant at that time was fully notified and informed of all the rights and equities between the original parties, to wit, defendants McCartney and Curran, and this defendant.

And this defendant further answering saith, that on the second day of February, A. D. 1863, at the time the premises mentioned in complainants' amended bill were conveyed by defendant, McCartney, to this defendant, it was agreed by and on the part of defendant, Curran, that Bradner, Smith & Co., this defendant being one of said firm, pay the three thousand dollar notes given by said Mc-
69 Cartney to said Curran, and specified in complainants' amended bill, as sold and assigned by said Curran to the complainants in wrapping paper, or other paper, as should be ordered by said Curran from time to time, said paper to be and compare, in all respects, in quality, size and price with the sample delivered to said Curran on that day, to wit, February 2d, A. D. 1863, the price being thereon marked by said Smith & Co., and that the same be endorsed on the notes aforesaid, said paper being delivered at the store of said Smith & Co., in Chicago, upon the orders of said Curran. And it was further agreed that all of said paper should be ordered within ninety days from that date. And this defendant says that said Curran did so order such paper within said ninety days, to the amount and of the value of sixteen hundred dollars, leaving due upon said notes only about the sum of fourteen hundred dol-
70 lars. And it was on said 2nd day of February, 1863, further agreed by said Curran that he would not have the right to order any one kind of paper at any one time in larger quantities than said Smith & Co. should have on hand at the time of receiving such orders or order.

And this defendant further answering saith, that during said ninety days said Smith & Co. had at all times on hand kinds and quantities of paper required to answer and fill such orders and pay said notes in full, but that said Curran did not, during said ninety days, nor has he, or any other person or persons since that time, demanded or ordered the balance of paper to pay said notes in full; and this defendant says that had said paper been so ordered during said ninety days, or at any reasonable time since, said Smith & Company were ready and willing, and would have filled said order or orders to
71 the full amount of the sum due on said notes, deducting therefrom the amount of the incumbrance upon said premises, as hereinbefore stated, and existing by virtue of said mortgage to said Hand, which said [said] incumbrance this defendant has now paid, as hereinbefore stated, or said Smith & Co. would have, during any and all of said time, paid said sum in full, in case the said lien and incumbrance had in any legal manner or way been removed and discharged. And that said Smith & Co. have at all times been, and now are ready, and offer to fill all such order or orders as may now be necessary for paying such sum or sums, if any, as may now be due on said notes.

And this defendant further says, that said Curran did not endorse the paper he did receive upon said orders upon said notes

at the time he received said paper, as he had agreed to
72 do, all which agreements, facts and circumstances the complainants in this cause had notice of at the time of the pretended transfer of said notes and mortgage to them by said Curran, as alleged in their amended bill.

And this defendant upon his knowledge and belief, and as he is informed and verily believes, gives this honorable court to know and understand, that said Curran is now utterly insolvant and unable to pay his debts, and that any suit or action against him to recover the amount and value of said paper so delivered to him upon said agreement by Smith & Co. would be unavailing and fruitless, he being worthless and utterly unable to satisfy any judgment which they might obtain against him.

And this defendant further gives this honorable court to understand and be informed, that he is informed and verily be-
73 lieves that said McCartney is now utterly insolvent and unable to pay his debts, and that an action on the warranty contained in his deed to this defendant would be useless, unavailing and fruitless, and was so at the time said forgery was first discovered.

And this defendant denies that there is now due upon said notes the sum of two thousand dollars, or any sum at all, and denies that the plaintiffs have any claim whatever by virtue of the mortgage made originally by said McCartney to secure said notes; but that whatever, if anything is due upon said notes, after deducting the sum paid by this defendant to redeem from said sale made by said master as hereinbefore fully specified, is due upon the aforesaid agreement to take paper for the same, as hereinbefore stated.

And this defendant insists and claims, that the complainants
74 in this case, have no claim whatever upon the premises described in their amended bill; and that such claim which said Curren originally held was by him relinquished and abandoned in consideration the said three thousand dollars be paid in ninety days, from February 2, 1863, and long before the same became due by the original contract; and if the whole has not been paid, it is in no wise the fault of said Rodman, Smith & Co., or this defendant, but wholly the fault and neglect of said Curran.

And that said Curran having assigned said notes to the complainants after the same were due, that said complainants had due notice of all such fault and neglect, and the rights and equities of this defendant, and are answerable for the same, the same as through said notes had not been assigned, and these proceed-
75 ings had been in the name and interest of said Curran; and this defendant claims and submits to the honorable that the incumbrance so paid by him as aforesaid ought in equity and good conscience to be and remain a lien upon said premises, prior to the claims of these complainants; and that said premises should not be sold to satisfy what claims, if any, the complainants have, but that the complainants should be left to persue their remedy upon the contract aforesaid, made February 2d, A. D. 1863; and this defendant,

for the reason and the considerations aforesaid, is advised and insists that the said complainants are not entitled to the relief they pray for in their said amended bill, and that said premises should in no wise be held or disposed of to satisfy their demand, if any they have; and that this defendant should in no wise be held individually liable for the payment of the same; and this defendant further humbly
76 prays and insists that his just and equitable rights in the premises should be protected by this honorable court; and this defendant denies all and all manner of unlawful combinations and confederacies wherewith he is by said amended bill charged, without this that there is any other matter, cause, or thing in the said complainants' amended bill contained material or necessary for this defendant to make answer to, and not herein and hereby well, fully and sufficiently answered, confessed, traversed, waived, or denied is true to the knowledge and belief of the defendants; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully and justly sustained.

GEORGE C. SMITH.
R. S. WILSON & E. G. ASAY,
Solicitor for Smith.

77 Endorsed: Filed Oct. 2d, 1865. Wm. H. Bradley, clk.

78 On this day, to wit, the 22d day of February, A. D. 1866, in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

Leave to file replications.

JOHN L. MANNY *et al.*
vs.
JAMES MCCARTNEY *et al.* } Chancery.

Now come the complainants by their solicitors, and on their motion leave is given them to file replications herein.

On the same day, to wit, the 22d day of February, A. D. 1866, came said complainants by their solicitors, and filed in said clerk's office their replications in said entitled cause, which said replications are in the words and figures following, to wit:

United States District Court, northern district of Illinois.

Replication.

JOHN T. MANNY *& al.*
vs.
JAMES MCCARTNEY *& al.* } In chancery.

The replication of John T. Manny, George S. Drake and William Downing, complainants, to the answer of George C. Smith, defendant, to amended bill of complaint: These repliants, saving and reserv-

79 ing to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant for replication thereunto, say that they do not and will aver, maintain and prove their said amended bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer is very uncertain, evasive and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

GOUDY & CHANDLER,
Sols. for Compl't.

Endorsed: Filed Feb'y 22d, 1866. Wm. H. Bradley, clk.

80 United States Circuit Court, northern district of Illinois.

Replication.

JOHN T. MANNY & *al.*
vs.
JAMES MCCARTNEY *et al.* } In chancery.

The replication of John T. Manny, George S. Drake, and William Downing, complainants, to the answer of George C. Smith, defendant: These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith: That they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer is very uncertain, evasive and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true. All which matters and things these repliants are ready to aver, maintain and prove, as this houorable court shall direct, and humbly prays, as in and by their said bill they hath already prayed.

GOUDY & CHANDLER,
Sol's for Compl'ts.

Endorsed: Filed Feb'y 22, 1866. Wm. H. Bradley, cl'k.

81 On this day, to wit, the 26th day of February, A. D. 1866 in the record of the proceedings of said court in said entitled cause, is the following entry, to wit:

Leave to file cross-bill.

JOHN L. MANNY, GEORGE S. DRAKE, and William Downing, *vs.* JAMES MCCARTNEY, GEORGE C. SMITH, Frank M. Kerwin, *et al.* } Chancery.

Now come the defendants, by their solicitor, and on his motion leave is given them to file their cross-bill herein, which is accordingly done, and thereupon the complainants herein file their answer to said cross-bill.

82 And afterwards, to wit, on the 26th day of February, A. D. 1866, the said George C. Smith, by Wilson & Asay, his solicitors, filed in said court his cross-bill, in the words and figures following, to wit:

Cross-bill.

GEORGE C. SMITH *vs.* JOHN T. MANNY *et al.* } In chancery.

UNITED STATES CIRCUIT COURT, *Northern District of Illinois, ss:*

To the honorable judge of the Circuit Court of the United States for the northern district of Illinois, in chancery, sitting:

Humbly complaining, shows unto your honors your orator, George C. Smith, who is a citizen of the State of Illinois, that on or about the first day of July, A. D. 1861, one Dennis Curran and wife conveyed, by deed, to one James McCartney, the following described real estate, situated in the county of Cook and State of Illi-

83 nois, to wit: Lot number eleven in block numbered (61) sixty-one, in the school-section addition to the city of Chicago, (of which said premises the said Curran was then and there, or pretended to be, seized in fee simple,) together with all the privileges and appurtenances thereto belonging; that afterwards, on or about the second day of February, A. D. 1863, said McCartney, by his warranty deed of that date, conveyed said premises to your orator, and which said deed is recorded in the recorder's office for said county of Cook, in book 252, page 543, in which said deed the said McCartney covenanted and agreed that said premises were free from all incumbrances and liens, except as to one certain mortgage for three thousand dollars to said Dennis Curran, given by said McCartney, and which said mortgage was, as this complainant is informed, transferred

84 to the defendants, as hereinafter specified. All of which said deeds your orator prays leave to present to this honorable court and prove the same.

And your orator gives this honorable court to be informed and understand, that at the time of said conveyance to him of said premises by said McCartney, that there was in fact a prior lien and incum-

brance on said premises except and beside said mortgage for three thousand dollars from said McCartney to said Curran, to wit, a mortgage given by said Curran to one Edward Hand to secure the payment of six hundred dollars, with interest at the rate of ten per cent., in one year from the date of said mortgage, and which said mortgage was dated August 31, A. D. 1859, and recorded in the recorder's office for said county, in book 48, page 125, and which your orator prays leave to present and prove to this honorable court, and
85 which said mortgage has never been paid, released, or discharged except as hereinafter specified, and which said mortgage always has been, and still is, a good, valid and existing claim upon said premises. And this complainant says that the note given to secure the payment of said six hundred dollars, and which said note was secured by said mortgage from Curran to Hand as aforesaid, has never been paid by said Curran or any other person or persons for or in his behalf.

And your orator further humbly shows that on the 15th day of March, A. D. 1862, said original note for $600 was delivered up to said Curran, and another note for the same sum substituted in its place, and that it was expressly agreed and understood by and between said Curran and Hand, at the time of such exchange of notes, that the same was in no wise to be considered as a payment of said
86 original note for $600; and that said exchange was in no wise to satisfy or discharge said mortgage so given to secure the first note, but that the same was to be and remain in full force and effect.

And your orator further gives your honors to know and be informed that said substituted notes has never been paid, or said mortgage discharged, except by your orator, as hereinafter specified.

And your orator further says that upon the records of mortgages for said county and States there appears a writing purporting to be a release and discharge of said mortgage, which discharge and release purports to be signed and executed by said Hand. And your orator gives your honors to know and understand that said writing so purporting to be a discharge and release of said mortgage is in
87 fact a forgery, and that the same was never made and executed by said Hand or any person by him authorized, but utterly without his consent and knowledge; and further, that said pretended discharge and release was not know to be a forgery at the time said McCartney conveyed to your orator.

And your orator further says, that after the execution of said note and mortgage, the same were for a valuable consideration transferred and assigned by said Hand to one Roderick F. Farrell, and that after such assignment and transfer to said Farrell he instituted a suit in the Recorder's Court of the city of Chicago, on the chancery side thereof, at the April term, A. D. 1864, against your orator and said Curran, for the purpose, and praying for the cancelling of the said pretended release and discharge, on the ground of the fraud and forgery aforesaid, and that said mortgage be held valid and in
88 full force and effect, and prayed for a foreclosure of the same,

which said court then and there had full jurisdiction of the parties and subject-matter in suit. And that afterwards, upon a full hearing of the merits of said case, said court granted the prayer of said Farrell and declared, ordered and decreed that said pretended release and discharge was false, fradulent and forged, and null and void; and that said substituted notes had never been paid or cancelled; and that said mortgage, so securing the same, was good and valid, and had never been released or discharged; and said court then and there ordered and decreed said premises to be sold for the payment of the same, in pursuance of which decretal order one John Woodbridge, esq., was by said court appointed a special master in chancery, with direction to sell said real estate, described
89 in said Farrell's bill, said real estate being the same conveyed by said McCartney to your orator.

And thereupon said Woodbridge, having given proper notice of the intended sale by publication, and in all respects having followed the orders and directions of said court, on the first day of September, 1864, offered said premises for sale at public auction to the highest bidder for cash, at which time and place said Farrell bid for said premises the sum of seven hundred and fourteen dollars and forty-four cents, (said court having found the amount due on said notes and mortgage to be $647 90,) and said sum being the highest bid for said premises, they were struck off to said Farrell; and said master then and there executed and delivered to him a certificate of sale containing, among other things, that if said premises were not redeemed on or before December second, A. D. 1865, said
90 Farrell would be entitled to a deed of said real estate; and your petitioner and orator is further informed, and verily believe, that after said sale and the delivery of said certificate of sale to said Farrell, he transferred and assigned all his right, title and interest therein to these defendants, but what consideration, if any, they paid him therefor, your orator knows not, or whether or not the same was made in good faith, your orator is ignorant.

And your orator further saith, that after such sale and delivery of said certificate of sale as aforesaid, and before the expiration of the time in which said premises were to be redeemed, if at all, he being the owner in fee of said premises so sold as aforesaid, as such owner in fee redeemed the same from said sale by paying said master therefor the sum of seven hundred and ninety-two dollars and
91 forty-eight cents, that being the full amount of what said premises were sold for, together with the legal costs accruing from such sale; and said Woodbridge, as such master, thereupon executed and delivered to your orator a certificate of redemption, stating therein the amount paid for such redemption, and that the same was paid by your orator, which certificate is recorded in the recorder's office for said county, and which your orator prays leave to present and prove before this honorable court, as also the said certificate of sale; and your honors are further informed by your orator, that at the time of said redemption he did not intend or mean to forever release and discharge said premises from said mortgage, but

that the same should continue to be a lien upon said real estate until he was repaid and reimbursed for said sum so paid for such
92 redemption and for his trouble in that behalf sustained; and further, that your honors are humbly informed that your orator has every reason to believe, and in fact doth believe and say, that at the time of such redemption by him from said sale, the defendants herein were the holders and pretended to be entitled to the benefit of said redemption money, and that in fact they have received the full benefit of the same.

And your orator further saith, that when said pretended and forged discharge and release of said Hand mortgage as aforesaid was first discovered and know to be a forgery, that the said McCartney was utterly insolvent and bankrupt and unable to pay his debts, and that an action on his warranty would have been fruitless and unavailing.

And your orator further saith, that at the time of the con-
93 veyance of the property herein specified to him by said McCartney, there was in fact a mortgage upon said premises to the amount of three thousand dollars, given by said McCartney to said Curran to secure the payment of three one thousand dollar notes, in one, two and three years respectively from date, the date of which said mortgage and notes was on or about July 1st, 1861, and which mortgage is recorded in said recorder's office, book 60, page 78.

And your orator further saith, that on the 2d day of February, A. D. 1863, at the time the premises herein mentioned were conveyed by said McCartney to your orator, it was agreed and understood by and between said Curran and himself, said Curran then being the holder and legally entitled to said three one thousand dollar notes, that Brad-
ner, Smith and Company, your orator being one of said firm,
94 should pay said notes given by said McCartney to said Curran as aforesaid, in wrapping paper or other paper, as should be ordered by said Curran from time to time, said paper to be and compare in all respects in quality, size and price with the sample delivered to said Curran on that day, to wit, February 2, 1863, the price being thereon marked by said Bradner, Smith & Co., and that the same be endorsed on the notes aforesaid and toward payment of the same, said paper to be delivered at the store of Bradner, Smith & Co., in Chicago, upon the order of said Curran; and it was further agreed and understood that all of said paper should be ordered within ninety days from date.

And your orator saith, that said Curran did so order such paper within said ninety days to the amount and value of sixteen
95 hundred dollars, leaving due upon said notes only about fourteen hundred dollars.

And your orator saith further, that during said ninety days said Bradner, Smith & Co. had at all times on hand kinds and qualities of paper to answer and fill such orders and pay said notes, but that said Curran did not during said ninety days, nor has he since, or any person for him, ordered said balance of said paper to pay what remained due on said notes; and this your orator saith, that had said paper been

ordered during said ninety days or at any time since, said Bradner, Smith & Co. were ready and willing and would have filled said order or orders to the full amount due on said notes, after deducting the amount of the incumbrance upon said premises as aforesaid, and which, as before stated, your orator has paid, and said Brad-
96 ner, Smith & Co. would at all times have paid said sum in full in case said lien and incumbrance had in any legal way or manner been removed and discharged.

And your orator further shows, that said Curran did not endorse the paper to the amount of sixteen hundred dollars, which he did receive on said agreement upon said notes and toward the payment of the same, which in equity and good conscience he ought to have done; and further, that said Curran is now worthless and utterly insolvent, and that any legal action against him for the recovery of said paper or the value of the same would be unavailing, as any judgment which your orator might obtain against him would be of no avail, he being unable to satisfy the same.

And your orator further shows unto this honorable court, that the defendants in this suit claim and pretend that two of said three
97 thousand dollar notes, to wit, the notes due in two and three years respectively, and the mortgage securing the same, have been transferred and assigned to them by said Curran.

And that they are entitled to payment and satisfaction of the same, out of the real estate hereinbefore specified.

And your orator humbly gives this honorable court to know and be informed, that he has good reason to believe, and in truth doth believe, that said notes were not endorsed, if at all, to said defendants until a long time after they were due and payable, and that when they were endorsed, if at all, the defendants hereto had full knowledge and notice of the agreement to take paper in payment of said notes and mortgage as aforesaid, and of all the equities existing between said Curran and your orator, and that they so took said notes and mortgage, subject to all the rights, equities between the
98 original parties thereto and your orator. And further, that if said notes and mortgage were assigned and transferred to these defendants, as they allege, that the same was not in good faith and for a valuable consideration, but were for an old indebtedness from said Curran to them, and were taken, as your orator in fact and truth believes, not for a valuable consideration, but merely as collateral security for such indebtedness.

But now so it is, may it please your honors, that the said John T. Manny, George S. Drake and William Downing, combining and confederating together, and with divers other persons to your orator unknown, whose names when discovered your orator prays he may be at liberty to insert, with apt words to charge them as parties defendant hereto; and contriving how to wrong and injure your orator in the premises, have lately filed their bill in this honorable court
99 against your orator, and divers other persons, they being at the time of the filing of such bill residents of the State of Missouri, wherein they allege and say, among other things, that they are

now the holders of said two one thousand dollars notes, payable respectively in two and three , given by said McCartney to said Curran, and the mortgage given to secure the same, the same, as they alleged, having been transferred and assigned to them by said Curran, and that the same are now due and unpaid. And praying, among other things, that said James McCartney be decreed to pay to them the principal sum of two thousand dollars, so alleged to be due upon said two promissory notes, and all the interest now due, or to become due thereon, together with all the costs and expenses alleged to have been sustained by them in that behalf, by a short day to be appointed by the honorable court; and in default thereof that the said
100 James McCartney, and all persons claiming or to claim under him, may be foreclosed of and from all equity of redemption, and claim of and in the premises described in their said mortgage, and which are the same conveyed by McCartney to your orator, and that all and singular the said mortgaged premises may by order of the honorable court be sold, and out of the monies arising therefrom the complainants in said bill (being the defendants in this) may be paid the full amount of said principal sum of two thousand dollars hereinbefore specified and alleged to be due on said notes, and interest, together with all their cost and charges in that behalf sustained.

Whereas your orator charges, that the contrary thereof is true, and denies that said premises ought to be sold for the payment of said notes, and that there is now due and remaining unpaid
101 upon said mortgage notes the sum of two thousand dollars, or any sum at all, and your orator says that he is equitably entitled to the benefit of the mortgage originally given by said Curran to said Hand to secure the note for six hundred dollars hereinbefore specified, and sold by order and decree of court, as hereinbefore stated, your orator having, contrary to equity and good conscience, been obliged and compelled to pay a large sum of money to redeem from such sale, and that in equity and good conscience he ought to be allowed and permitted to hold and continue said mortgage as a lien and incumbrance upon said premises until he is repaid and reimbursed for such sum as he paid to redeem from said sale, and also for his trouble and expenses in that behalf most unjustly and wrongfully sustained.

And that said mortgage is a prior lien and incumbrance
102 upon said premises, and ought in equity and good conscience to be paid, and that these defendants have no claim upon said premises by virtue of their pretended mortgage, but that the same was relinquished and forever discharged by the aforesaid agreement to take paper in payment of said notes; all of which these defendants were informed and had notice of; and that if anything is now due upon said notes, after deducting the sum paid by your orator to redeem from the sale on the Hand mortgage, it is due upon the said agreement to take paper.

All which claims, demands and pretences of the defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof, inasmuch as your orator is en-
103 tirely remediless in the premises. according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said George S. Drake, John T. Manny and William Downing, and their confederates, when discovered, may without oath (their respective oaths being hereby expressly waived) full, true, direct and perfect answer make to all and singular the charges and matters aforesaid, as fully and particularly as if the same were hereinafter repeated, and they thereunto particularly interrogated according to the best of their respective knowledge, information and belief, and that they, the said defendants, be by this honorable court restrained from foreclosing said mortgaged premises, and that they be restrained from selling said premises for the
104 payment of their pretended claim, and that your orator may have such further or other relief in the premises as the nature of his case shall require and to your honor shall seem meet.

May it please your honor to grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to said John T. Manny, George S. Drake and William Downing, thereby commanding them, and every of them, to be and appear before this honorable court on a day certain, then and there to answer all and singular said premises, and stand to perform and abide such order and decree therein as shall seem agreeable to equity and good conscience, and your orator shall ever pray, &c.

GEORGE C. SMITH,
By WILSON & ASAY,
His Solicitors.

Endorsed: Filed Feb'y 26th, 1866. William H. Bradley, cl'k.

105 And on the same day, to wit, the 26th of February, A. D. 1866, the said John T. Manny, George S. Drake and William Downing, by their solicitors, Gondy and Chandler, filed in said court their joint and several answers to said cross-bill, in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois.

Answer to cross-bill.

GEORGE T. SMITH
vs.
JOHN T. MANNY *et al.* } In chancery.

The joint and several answer of the defendants, John T. Manny, George S. Drake, and William Downing, to the cross-bill of the said George C. Smith:

These respondents, saving and reserving to themselves all advantage or exceptions to any uncertainties and insufficiencies in the said cross-

bill contained, for their answer thereunto, or so much thereof as these respondents are advised is material and necessary to be
106 answered thereunto, say that they admit that the said Dennis Curran conveyed lot number eleven, in block number sixty-one, in school section addition in Chicago, in county of Cook, and State of Illinois, to one James McCartney, by deed dated the first day of July, A. D. 1861, and that the said McCartney conveyed the same premises ont he 2d day of February, A. D. 1863, to the complainant, George C. Smith, with a covenant as described in said cross-bill.

And these respondents further answering admit, that before the conveyance to the said complainants, namely on the 31st day of August, A. D. 1859, the said Dennis Curran executed to one Edward Hand a mortgage on the said premises to secure the payment of a note for six hundred dollars, which was recorded in the office of the clerk of the Circuit Court in and for the county of Cook aforesaid, on the 12th day of December, A. D. 1859, and that there appears on said records of said mortgage a writing purporting to be a release of the same, bearing date July, 1862, and purporting to be executed
107 by said Hand in the presence of D. O'Hara; and they further admit that the said Edward Hand made an assignment of his interest in said note and mortgage to one Roderick F. Farrell, who commenced a suit in the Recorder's Court, in the city of Chicago, on the chancery side thereof of the April term, 1864, against the complainants George Smith and said Curran for the cancelling of said release, on the ground of fraud and forgery, and for the foreclosure of the mortgage, and that such proceedings were had in said cause by said court, that it was ordered and decreed that the release aforesaid was fraudulent and forged, and null and void, and that the defendants pay the amount due; in default thereof, that the premises be sold by one John Woodbridge, who was appointed a special master for that purpose, and that said Woodbridge, in pursuance of the decree, on the 1st day of December, 1864, sold the premises aforesaid to the said Roderick Farrell for the sum of seven hundred and fourteen dollars and forty-four cents, and that the said Woodbridge, as
108 a special master, executed and delivered to him a certificate of purchase, as required by law in such cases, and that afterwards, and before the expiration of twelve months from the date of said sale, the said Roderick Farrell assigned and transferred the said certificate of purchase to these defendants; they aver that they pay therefore the sum of seven hundred and eighty-six dollars and forty-six cents.

And they further aver that the said purchase was made by them in good faith, and upon the actual payment of the said sum of money for the purpose of holding the same, according to the terms of the said certificate, and obtaining the redemption money thereon in case any redemption should be made; and if none should be made, to obtain a deed under said decree.

But these respondents, further answering, say, that they have no knowledge, or information and belief, as to the statements in the

said cross-bill, in regard to alleged forgery of said release, or the existance of the mortgage, as a prior encumbrance, except so
109 far as the facts are shown by the proceedings in the case, in the Recorders Court, as aforesaid; and these respondents aver that the decree rendered in said cause is conclusive evidence as against the parties thereto of the truth of the statements contained in regard to the said questions contained in cross-bill.

And these respondents further answering admit, that before the 1st day of September, 1865, the said complainant, George C. Smith, claimed to be the owner in fee of said premises, and as such owner redeemed the same from the sale under said decree by paying the special master aforesaid the sum of seven hundred and ninety-two dollars and forty-eight cents, and that said Woodbridge as such master granted a certificate of redemption as provided by law; but these respondents deny that the said complainant did not intend to release or discharge said premises from said mortgage, but on the contrary, they aver that such act of redemption discharged and removed the lien existing under said decree and sale on said premises; and
110 these respondents say that the secret intent of a party in making a redemption under the statute of the State of Illinois cannot effect the rights of the parties thereunder.

And these respondents admit that they have received the redemption money so paid to the special master as aforesaid. And these respondents further answering say, that they have no knowledge or information and belief as to when the alleged forgery of the said release was first discovered, or whether the said McCartney was insolvent or not at that time.

And these respondents, further answering said cross-bill, deny that at the time the premises were consigned by the said McCartney to the complainant George C. Smith, or at any other time when the said Curran was the holder of the three one thousand dollars notes described in said cross-bill that it was agreed between the said Curran and George C. Smith, the complainant, that the note should be paid in writing paper or other paper as alleged in the said bill; and they deny that the said Curran, under and in pursuance of any such agreement, ordered paper to the amount of sixteen hundred dollars or any other sum; and they deny that the said Bradner, Smith & Com-
111 pany had at the time mentioned in the said cross bill the kinds and quantities of paper to answer and fill such supposed order.

And these respondents, further answering, admit that said Curran did not endorse any amount upon the two notes last becoming due, and they deny that the said Curran is now worthless and utterly insolvent, and they admit that these defendants claim the two notes for one thousand dollars each falling due in two and three years respectively, and the mortgage securing the same, and they aver that said two notes were, before they severally became due, transferred and assigned to them by said Curran, without recourse on him by indorsement in writing, on the back thereof, and that they are now entitled to payment of the same out of the real estate described in said mortgage.

And these respondents further deny that they had any knowledge or notice of any agreement to take paper in payment of said notes and mortgage before or at the time of said assignment to them;
112 and they aver that they paid in goods and merchandise the full amount of principal and interest due on said notes to said Curran; and before the same was transferred to them, and before they consented to take the same without recourse, they procured an abstract of title of the said premises which showed that said notes and mortgage were a valid lien on said lot, and that there was no prior encumbrance thereto, and therefore acting in good faith and without any notice of any pretended defence thereto they took said notes and paid therefor the consideration aforesaid. And these respondents expressly deny that the same were taken as collateral security or in payment of an indebtedness existing before that time; and these respondents aver that even if any such agreement alleged in said cross-bill was made between the said Curran and the said complainant Smith, the same would not constitute any valid or legal offset to said notes.

And these respondents deny all other matters and things in
113 said cross-bill contained, not herein confessed or otherwise sufficiently answered; and now, having fully answered the said cross-bill, they pray that the same may be dismissed and a decree entered for the foreclosure of the mortgage prayed for in the original bill herein.

JOHN T. MANNY.
GEORGE S. DRAKE.
WILLIAM DOWNING.
GOUDY & CHANDLER,
Solicitors.

Endorsed: Filed Feb'y 26th, 1866. Wm. H. Bradley, cl'k.

114 On this day, to wit, the 10th day of October, A. D. 1866, in the record of the proceedings of said court in chancery in said entitled cause, is the following entry, to wit:

Time extended to take proof.

JOHN T. MANNY *et al.*
vs.
JAMES MCCARTNEY *et al.* } Chancery.

On motion of the defendants by their solicitors, the time is extended thirty days in which to take proof herein.

On this day, to wit, the 20th day of May, A. D. 1867, in the record of the proceedings in chancery of said court in said entitled cause, is the following entry, to wit:

Cause set for hearing.

JOHN T. MANNY, GEORGE S. DRAKE AND William Downing,
vs.
JAMES MCCARTNEY, GEORGE C. SMITH, Frank M. Kerwin, Edwin Blackman, Myron H. Norton, Charles A. Norton and Roderick F. Farrell; } Chancery. Original bill.

And

GEORGE C. SMITH
vs.
JOHN T. MANNY, GEORGE S. DRAKE AND William Downing. } Cross-bill.

115 Now comes the parties by their solicitors, and by agreement this cause is submitted to the court upon the original and cross-bill of complaint, the answers thereto, the replications, exhibits and proof on file herein and upon arguments of counsel hereafter to be made.

On the hearing of said cause the following proofs were read in evidence and are in the words and figures following, to wit:

Complainant's proofs.

115½ The stipulation of the parties by their solicitors in said entitled cause is in the words and figures following, to wit:

Circuit Court of the United States northern district of Illinois.

Stipulated admission of facts.

JOHN MANNY AND AL.
vs.
JOHN MCCARTNEY AND AL. } In chancery.

It is hereby stipulated that it was admitted upon the hearing of the above entitled cause that at the April term, 1864, of the Recorder's Court in Chicago, Roderick F. Farrel, the assignee of the note to hand which was secured by the mortgage purporting to be released, filed a bill in said court against George C. Smith and Dennis Curran, alleging that said release was a forgery and seeking a decree of foreclosure. That on the 30th day of June, 1864, that cause was heard and a decree of foreclosure rendered fixing the amount due at $647 90,

and under said decree the master in chancery sold the lot, Sept. 1, 1864, to Farrel for $714 44, and issued to him a certificate of purchase calling for a deed in fifteen months if not redeemed.

That after the sale and before the expiration of twelve months, Farrel sold and assigned said certificate of purchase to the complainants for the amount of money due thereon. That before the
115¾ expiration of twelve months from the day of sale the defendant, George C. Smith, being the owner of the fee and as such redeemed from said sale under and according to the provisions of the statutes of Illinois, by paying the said bid and ten per cent. thereon to the master in chancery, and that said master paid said moneys to the complainants as the holders and assignees of the certificate of purchase. That the bill in this case was filed after the said bill was filed in the Recorder's Court, and before a decree therein and the decree in said cause in the Recorder's Court was rendered and all subsequent proceedings had pending this suit, and that the complainants in this suit had actual notice, and had been informed of the pendency of said proceedings in the Recorder's Court prior to the filing of the bill in this cause, but that they were not parties to said bill in the Recorder's Court. And it is agreed that this stipulation may be filed and be made a part of the record in this case.

GOUDY & CHANDLER,
Solr's for Complainants.
ASAY & LAWRENCE,
Solr's for Defendant Smith.

116 *Notes and mortgage.*

The notes and mortgage referred to in the pleadings in said cause are in the words and figures following, to wit:

$1,000. CHICAGO, *July 1st*, 1861.

Two years after date I promise to pay to the order of Dennis Curran one thousand dollars, with interest at six per cent. per annum, payable annually, value received.

JAMES McCARTNEY.

(Endorsed:) Without recourse on me.

DENIS CURRAN.

$1,000. CHICAGO, *July 1st*, 1861.

Three years after date I promise to pay to the order of Dennis Curran one thousand dollars, with interest at six per cent. per annum, payable annually, value received.

JAMES McCARTNEY.

(Endorsed:) Without recourse on me.

DENIS CURRAN.

Sale mortgage.

This indenture made this first of July in the year of our Lord one thousand eight hundred and sixty-one, between James McCartney of Deerfield, in the county of Lake, and State of Illinois, party of the first part, and Dennis Curran of Chicago, and State of Illinois, of the second part. Whereas the said party of the first part is
117 justly indebted to the said party of the second part in the sum of three thousand ($3,000) dollars, secured to be paid by three certain promissory notes bearing even date herewith, payable to the order of Dennis Curran in one, two and three years respectively, and for the sum of one thousand dollars each, with interest at six per cent., payable annually; said notes and consideration thereof being for purchase money of said lot hereinafter described and mortgaged.

Now therefore this indenture witnesseth: That the said party of the first part, for the better securing the payment of the money aforesaid with interest thereon, according to the tenor and effect of the said three promissory notes above-mentioned, and also in consideration of the further sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, aliened and conveyed, and by these presents does grant, bargain, sell, remise, alien and convey unto the said party of the second part, his heirs and assigns forever, all the following described lot, piece or parcel of land situate in the county of Cook, State of Illinois, to wit: lot number eleven (11) in block number sixty-one (61) in the school sec-
118 tion addition to the city of Chicago, being the same lot and premises this day sold and conveyed by the said Dennis Curran to the said James McCartney, and this mortgage is executed to secure notes given for purchase money of said lot above-described, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging or in anywise appertaining, with the rents, issues and profits thereof, and all the estate, interest and claim whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed; to have and to hold the same, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators and assigns, and to their only proper use, benefit and behoof; provided always and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, administrators or assigns, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the aforesaid sum of money with such interest thereon at the time and in the manner specified in the above-mentioned three promissory notes, according to the true interest and meaning thereof, then these presents and everything herein expressed shall be absolutely null and void; but in case of default in the payment of the said
119 notes above-mentioned, or any or either of them, or the interest thereon or any part thereof according to the tenor and

effect thereof, the said party of the second part or his legal representatives or attorney, shall have the right at his, her, or their option to declare the whole sum hereby secured due and payable, and after having advertised such sale (30) thirty days in a newspaper published in the said county of Cook, may sell the said premises or any part thereof, and all right and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns therein, at public vendue to the highest bidder for cash at the place and at the time appointed in such advertisement, or may adjourn the sale from time to time at discretion, and upon the making of such sale or sales shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold, and shall apply the proceeds of sale to the payment of (1) expenses for advertising, selling and conveying as aforesaid, including attorney's fee and (2) the amount due on said notes, (3) rendering the overplus, if any, to the said party of the first part, or to his assigns, or legal representatives.

In witness whereof, the said party of the first part hereunto
120 sets his hand and seal the day and year above-written.

[SEAL.] JAMES McCARTNEY.

Signed, sealed and delivered in presence of—

The words "or any or either of them or the interest thereon, the words "shall have the right at his, her, or their option to declare the whole sum hereby secured due and payable and" interlined at lines 33 and 34, and noted before signing, sealing and delivery.

Witness: P. S. SHERMAN.

STATE OF ILLINOIS, *Cook County, ss:*

I, D. P. Wilder, a notary public in and for the city of Chicago, in said county, in the State aforesaid, do hereby certify that James McCartney, who is personally known to me as the real person whose name is subscribed to the above mortgage appeared before me this day in person and acknowledged that he executed and delivered the said mortgage as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this first day of
121 July, in the year of our Lord one thousand eight hundred and sixty-one.

[SEAL.] D. P. WILDER, *Notary Public.*

Endorsed: No. 47038.

STATE OF ILLINOIS, *County of Cook:*

I certify that this instrument was filed for record the nineteenth day of August, A. D. 1861, at 1.15 o'clock p. m., and duly recorded in book 60, page 78.

W. L. CHURCH, *Recorder.*

122 *Deposition of John T. Manney.*

The deposition of John T. Manney, taken on the 18th day of March, A. D. 1867, before Wm. G. Colburn, esq., commissioner, &c., at his office, number 30 Court street, Boston, under and by virtue of a commission issued out of said court on behalf of the complainants and defendants in said cause, in the words and figures following, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer first. My name is John T. Manney; I am forty-nine years of age; my occupation is that of wholesale dealer in boots and shoes; and I reside in Winchester, in the county of Middlesex and Commonwealth of Massachusetts.

Interrogatory second. Do you know the parties to this suit or either, and which of them, and how long have you known them, respectively? Are you one of the complainants?

Answer second. I am myself one of the complainants. I do not know the defendant, McCartney, nor do I know who the other
123 defendants are. I am acquainted with George S. Drake and William Downing; they are my partners in business, and I have known them fifteen or twenty years.

Interrogatory third. Were you in the city of Chicago, Illinois, in or at any time during the month of August, September, October, November, or December, in the year one thousand eight hundred and sixty-three, (1863?)

Answer third. I do not think that I was in Chicago during the time mentioned in said third interrogatory; upon examination of my books I know that I was not.

Interrogatory fourth. Did you ever have any conversation with Mr. John B. Smith or Mr. George C. Smith, in the city of Chicago, Illinois, at the office of George C. Smith aforesaid, or at the office of Messrs. Wilson & Asay, in said Chicago, or at any other place, in regard to the notes in controversy in this suit, in or about the month of September, A. D. 1863, or at any other time?

Answer fourth. I never had any; I do not know either of the Mr. Smith's mentioned in the 4th interrogatory.

Interrogatory fifth. Did you ever have any conversation with E. G. Asay, esq., or E. B. Sherman, esq., in said Chicago, or any other place, in relation to these notes in the fall of 1863, or at any other time?

124 Answer fifth. I never had any. I do not know E. G. Asay, esq., or E. B. Sherman, esq., mentioned in said fifth interrogatory.

Interrogatory sixth. Do you know of anything further in relation to this controversy that will be of interest or benefit to said complainants? If so, state as fully and explicitly as if you were specially interrogated.

Answer sixth. I do not know anything about the case. It was commenced by my partners, and I am not familiar with the details.

Cross-interrogatories.

Cross-interrogatory 1. Were you, or either of the other complainants, to your knowledge, and which, in Chicago in the fall of 1863? and if so, did you or they, or either of them, and which, to your knowledge, see and converse with George C. Smith, one of the defendants, or with Mr. E. G. Asay, concerning the note in controversy?

Answer to cross-int. 1. I was not in Chicago at the time mentioned, nor do I know whether either of the other complainants was there or not?

125 Cross-interrogatory 2. Did either of your partners, who are complainants in this suit, and if so, which, ever tell you that he had a conversation with Mr. George C. Smith or E. G. Asay, concerning said notes, said Smith being one of the defendants in this suit?

Answer to cross-interrogatory 2. Neither of my partners ever told me anything of any conversation with Mr. Smith or Mr. Asay, or that they had ever had any conversation with said Smith or Asay.

JOHN T. MANNY.

126 *Dep. of G. S. Drake.*

The deposition of George S. Drake, taken on the 8th day of March, A. D. 1867, before George Denison, commissioner, at his office in St. Louis, State of Missouri, under and by virtue of a commission issued out of said court on behalf of the complainants in said cause, in the words and figures following, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to interrogatory 1st. My name is George S. Drake; my age is [is] forty-two; I am a boot and shoe merchant; my residence is 1310 Olive street, St. Louis, Missouri.

Interrogatory second. Do you know the parties to this suit, or either, and which of them, and how long have you known them, respectively?

Answer to interrogatory 2d. I am one of the parties plaintiffs to this suit. I have seen Mr. Smith, one of defendants. I am not acquainted with Mr. McCartney.

Int. 3d. State whether or not you are one of the complainants in this suit.

127 Answer to interrogatory 3rd. I am one of the complainants in this suit, and am a member of the firm of Manny, Drake & Downing.

Int. 4th. State whether or not said complainants ever received from Dennis Curran the promissory notes in controversy in this suit. If so, when? State fully the circumstances under which such notes were received, and the consideration paid by said firm to said Curran for said notes?

Answer to interrogatory 4th. The complainants received the notes in controversy in this suit from Dennis Curran. Sometime between

the 24th of August and the last of September, 1863, Curran came to us and represented that he had two notes of James McCartney's, dated Chicago, July 1st, 1861; one payable in two, the other in three years from that date, secured on real estate in Chicago, which notes he wanted to dispose of for boots and shoes. The notes were for the sum of one thousand dollars each. Somewhere between the 10th and 15th of September, 1863, we wrote to Chicago enquiring the value of the property, and by a letter dated the 17th day of September, 1863, we received an answer, saying the property would bring two thousand dollars at a forced sale. We then sent for an abstract of the title, which we received in a letter dated the
128 26th day of September, satisfying us that the title was good.

On the 30th September, 1863, we delivered to Mr. Curran an invoice of boots and shoes, amounting to twenty-one hundred and seventy-six dollars and twenty-six cents, and credited him on the same two thousand dollars, for which we received the notes in controversy. The remainder, one hundred and seventy-six dollars and twenty-six cents he paid us on the 12th of October next ensuing. On the 2nd day of October, 1863, we sent the notes to Young, Brothers & Co., of Chicago, for collection.

Int. 5th. At the time when said notes were assigned by said Curran to said firm, what representations, if any, did said Curran make in regard to said notes? The consideration thereof? The security for the same, and the reasons why he desired to sell the same?

Answer to interrogatory 5th. At the time of our receiving the notes, Curran gave us to understand that he had sold the property to McCartney, and these notes had been given for deferred payments of purchase money. He said the notes were received by deed of trust or mortgage on the property, and that the security was ample. I have an impression that Curran was not inclined to press McCartney for the payment of the notes, though I am not positive he gave this as a reason for selling them. The principal reason for
129 selling was, that he wanted to buy a stock of goods.

Int. 6th. What representations, if any, did said Curran make in regard to any existing offset to the notes?

Answer to interrogatory 6th. At the time of our transaction Curran made no representations whatever, directly or indirectly, as to any offset to the notes, and as we gave him a full consideration of two thousand dollars in boots and shoes, we should not have received the notes in payment if we had supposed there was any offset to them.

Int. 7th. What steps, if any, did you take to ascertain whether or not the said notes were well secured, and with what result?

Answer to interrogatory 7th. As I have already stated, we sent to Chicago, and ascertained the value of the property at a forced sale, that it could be sold in thirty days without redemption, and we also procured an abstract of title showing that it was unencumbered.

Int. 8th. State whether or not, at the time you received said notes, you had any notice of any payment or offset to them? and if so, what notice?

130 Answer to interrogatory 8th, None whatever; on the contrary we would not have received them, if we had supposed any shadow of an offset existed, or that they were entitled to any credit.

Int. 9th. When did you first hear of any claim of payment or offset to said notes, and from whom?

Answer to interrogatory 9th. We first learned that Mr. Smith intended to resist the collection of the notes and the foreclosure of the mortgage by a letter from Young, Bros. & Co. of Chicago, who had the notes for collection, dated October 5th, 1863, the reason being that one Hand had brought a suit in chancery to recover the amount of a mortgage, which, although released on the margin of the record, it was alleged had been done by forgery, and no mention up to this time had been made of any claim of offset by Bradner, Smith & Co.

Int. 10th. After hearing of such claim of offset, what steps, if any, did you take in order to ascertain the validity of such claim, and obtain payment of said notes?

131 Answer to interrogatory 10th. Between the 5th and 15th of October, 1863, I went to Chicago, and went to see Mr. George C. Smith, who represented to me that Bradner, Smith & Co. had a claim against Curran, the amount of which claim Curran had agreed to endorse on the note that was past due. I afterwards found out from Curran, that he disputed the amount of the claim which Bradner, Smith & Co. had against him, and as that matter was delaying the payment of the notes which we held, I endeavored to get Curran & Smith to compromise the difference between them. In order to effect this, I offered, rather than to litigate the matter, if Mr. Curran would pay to me the amount he admitted owing Bradner, Smith & Co., and one-third of the difference between them, I would allow another third of the difference, and in consideration thereof, Bradner, Smith & Co. should send to Curran a full receipt for their claim, Bradner. Smith & Co. also losing one-third of the difference;

132 but failing to effect any compromise between them, I put our claim against Mr. McCartney in the hands of our attorneys for collection.

Int. 11th. State whether or not you, at any time in the fall of 1863, and if so, when, had any conversation with Mr. Smith, of the firm of Bradner, Smith & Co. in relation to said notes?

Answer to interrogatory 11th. When I was in Chicago, as I have already stated, between the 5th and the 15th of September, 1863, I saw Mr. George C. Smith, who informed me he was a member of the firm of Bradner, Smith & Co., and had some conversation with him in regard to the notes in suit.

Int. 12th. If you say in such conversation that there was or had been any agreement with Curran to endorse any sum as paid on either of said notes?

Answer to interrogatory 12th. In that conversation I said nothing whatever regarding any agreement with Curran to endorse any amount whatever on the notes we held. I expressly deny that any

such agreement was ever made with Curran or any body else, or that any admission that such an agreement had been made, was made to Mr. Smith, or anybody else, as no such agreement had been
133 made. I did propose that if Curran and Smith would adjust the difference between them in the manner I have already stated, and Curran would pay me the amount they should agree upon as due from him to Brodner, Smith and Co., I would then endorse the amount so paid to me by Curran on the McCartney notes, which we held.

Int. 13th. Did you say, in such conversation, or any other about that time had with said Smith, or P. L. Sherman, or E. G. Asay, that said notes, or either of them, had been taken in payment of a debt of Curran contracted before the notes were received by your firm?

Answer to interrogatory 13th. I never said in conversation with any one, or at any time, that said notes, or either of them, or any part of either of them, had been taken in payment of a debt of Curran contracted before the notes were received by our firm; but the fact is that the notes were received by our firm in payment of a bill of goods sold by us to Curran at the time we received the notes from him.

Int. 14th. What consideration, if any, was actually paid by said Manney, Drake & Downing to said Curran for said notes?

134 Answer to interrogatory 14th. As I have already stated, the consideration paid by Manny, Drake & Downing to Curran for said notes was an invoice of boots and shoes sold by them to him at the time he gave them the notes; and further deponent saith not.

GEORGE S. DRAKE.

135 *Deposition of D. Curran.*

The deposition of Dennis Curran, taken on the 8th day of March, A. D. 1867, before George Denison, esq, commissioner, at his office in St. Louis, State of Missouri, under and by virtue of a commission issued out of said court on behalf of the complainants in said cause, in the words and figures following, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to interrogatory 1st. My name is Dennis Curran; my age is fifty-six years; I am a trader and general merchandizer, and my residence is No. 1,427 Broadway, in the city of St. Louis, Missouri.

Interrogatory second. Do you know the parties to this suit, or either and which of them, and how long have you known them respectively?

Answer to interrogatory 2d. I know the parties to this suit, all of them. I have known the parties in Chicago since the year 1852, and have known the parties in St. Louis for about three and a
136 half years.

Interrogatory 3d. State whether or not you ever assigned and transferred to Messrs, Manny, Drake & Downing, the complain-

ants in this suit, any promissory note purporting to have been executed by James McCartney, one of the defendants? If so, describe said notes, and state when you transferred them.

Answer to interrogatory 3d. I did assign to Manny, Drake & Downing, the complainants in this suit, two notes executed by James McCartney, one of the defendants. The notes were for a thousand dollars each, and were both dated in July, 1861, I believe, and were payable one in two years, and the other in three years after date. Both were made to my order, and signed by James McCartney, one of the defendants. I transferred both of those notes to Manny, Drake & Downing, I think, on the 30th day of September, 1863.

Int. 4th. What consideration, if any, did said Manny, Drake & Downing pay you for said notes?

Answer to interrogatory 4th. The consideration paid me by Manny, Drake & Downing for those notes was two thousand dollars' worth of boots and shoes.

137 Int. 5th. State whether or not, at the time you so assigned said notes, you made any representations to said Manny, Drake & Downing, or either of them, in regard to any offset to said notes, and if you did, state fully what said representations were.

Answer to interrogatory 5th. At the time I transferred those notes to Manney, Drake & Downing, I made no representations to them whatever as to any offsets to those notes.

Interrogatory sixth. State whether or not there was, at the time you so assigned said notes, any offset to said notes. State fully what your understanding was in regard to any claim of offset to said notes made by Messrs. Bradner, Smith & Co.

Answer to interrogatory 6th. There was no offset to the notes that I was aware of, at the time I transferred them to Manny, Drake & Downing. I owed Bradner, Smith & Co. some money on account, but I never considered it any offset against the note, and did not mention anything about it to Manny, Drake & Downing when I transferred the notes to them. George C. Smith had purchased the property on which there was a mortgage to secure the payment of these notes, and I considered that what I owed Bradner, Smith & Co. was no lien whatever against these notes.

138 Int. 7th. What reasons, if any, did you give to Messrs. Manny, Drake & Downing for desiring to sell and dispose of said notes?

Answer to interrogatory 7th. I don't remember giving Manny, Drake & Downing any particular reasons for desiring to sell and dispose of the notes to them. I don't know that I had any reason for selling the notes to them, except to get capital out of them.

Int. 8th. Was there any agreement between you and Manny, Drake & Downing, that any endorsement or credit of payment should be made by them on said notes or either of them?

Answer to interrogatory 8th. There was no agreement or understanding whatever between myself and Manny, Drake & Downing that there should be any credit or endorsement made by them on the note. It was never talked of at all.

Int. 9th. Was any part of the consideration for the transfer of said notes, or either of them, indebtedness contracted by you to them before any agreement to transfer the notes, or for any precedent debt.

Answer to interrogatory 9th. No part of the consideration of the sale of the notes by me to Manny, Drake & Downing was old indebtedness existing before the sale. I owed them nothing at the time. The whole of that consideration was paid to me in goods at the time of the sale, and further deponent saith not.

DENIS CURRAN.

139 *Def'ts proofs.*

Depositions of George C. Smith and John B. Smith, witnesses produced, sworn and examined before Thomas S. McClelland, a notary public in and for the city of Chicago, on behalf of the defendants, on the 12th, 13th and 22d days of December, A. D. 1866.

Dep. of G. C. Smith—Direct-examination.

By Mr. Asay:

Q. 1. What is your name, age, occupation and place of residence. Are you acquainted with any of the parties in this suit, and if so, which?

A. My name is George C. Smith; my age is thirty-seven; I reside in Chicago, and am a banker. I am one of the defendants, and complainant in the cross-bill. I am acquainted with the complainants, and have seen one of the complainants, Mr. Manney.

Q. 2. Did you have any conversation with Mr. Manney, one of the complainants in the original bill, in reference to the matter in controversy in these suits? If so, state what it was, and when and where it was.

A. I had a conversation with Mr. Manney; I can't tell the month. I think it was in September, 1863. I had one conversation with him in my own office in Chicago, and once at the office of Mr. Asay, in regard to these notes. I told him there should be an endorse-
140 ment on the first note of, I think, six hundred and thirty dollars, which he said he understood that there was an endorsement to be made on that note when he bought the note, but that there was a question as to the amount between us and the party from whom he took it, Mr. Curran. The first one was past due at the time he took it.

Q. 3. At the time of your conversation with him had the two years' note been some time over due?

A. It had.

Q. 4. Who is the owner of this property, and when did they become the owner, and have they owned it ever since they became possessed of it?

A. The property belongs to the firm of Bradner, Smith and Company. The title is in me. We became the owners in the spring of 1863.

Q. 5. From whom did you buy it, and what was your contract with the seller?

(Objection made to second branch of the question by Mr. Goudy.)

A. We bought it from one Dennis Curran. The contract was with him, we were to pay three thousand dollars for the property.

Q. 6. What do you mean by this three thousand dollars?

A. We were to pay the notes, the three notes of one thou-
141 sand dollars each, secured by a mortgage on this property.

Q. 7. What disposition was made of the first note mentioned in the mortgage? If paid, by whom and to whom?

A. The first note was paid and taken up by Bradner, Smith & Company; paid to Dennis Curran.

Q. 8. Who held the three notes at the time you bought the property?

A. This man Curran, I suppose.

Q. 9. From whom did you derive your title?

A. We derived our title from McCartney.

Q. 10. Is there anything paid upon this second note, the one due July 1st, 1863? If so, how much?

A. There is six hundred and thirty dollars paid on it.

Q. 11. Had that been paid before your conversation with Mr. Manney?

A. It had.

Q. 12. Since your purchase of this property, and up to this time, who has been in possession of this property?

A. Bradner, Smith & Company.

**Cross-examination.*

By Mr. Goudy:

Q. 13. Have you ever had any conversation with either of the other complainants in this case?

A. I did not.

142 Q. 14. Did Mr. Manney state to you, in a conversation alluded to, that the complainants knew, at the time the complainants took the notes in controversy, that there had been a payment, or any claim of payment, on either of the two notes described in the bill?

A. My recollection is that he did.

Q. 15. State, as nearly as you can, what he said in regard to that matter.

A. He took the note after it was due, with the understanding from Mr. Curran, of whom he purchased the note, that there was some endorsement to be made on it.

Q. 16. Did he tell you what complainants gave Mr. Curran for the two notes?

A. I think they paid in boots and shoes; the amount I don't know. They paid in boots and shoes, or clothing, or both.

Q. 17. Did not Mr. Manney claim that he had paid two thousand dollars for these notes in controversy, and refuse to allow any offset?

A. I don't think he did. He made offers agreeing to endorse certain amounts on the notes.

Q. 18. What amount did he offer to endorse?

A. I could not tell the exact amount. I think between four and five hundred dollars.

143 Q. 19. Was not this offer made for the purpose of compromising the controversy about the notes?

A. Well, I don't know as to that. We claimed our full amount of payment due on the notes. I claimed further that there was another mortgage, I believe, against the property.

Q. 20. To whom did you make a payment on either of these notes?

A. To Dennis Curran.

Q. 21. When was the payment made?

A. Payment was made in the spring of 1863.

Q. 22. How was it made, in property or money?

A. It was made in paper, agreeable to contract.

Q. 23. Do you know, of your own knowledge, who held the two notes in controversy at the time you delivered the paper?

A. I don't know. Curran professed to hold them.

Q. 24. When was the first note taken up?

A. In the spring of 1863.

Q. 25. Was the contract in regard to the payment of these notes in writing?

A. It was.

Q. 26. Can your furnish a copy of it, and will you attach the same as an exhibit to this deposition?

A. Yes, sir?

(The same is hereto annexed as exhibit "A.")

144 Q. 27. Was there a controversy between Curran and Bradner, Smith & Company as to the amount due, or the price of the paper he had received?

A. There was a controversy in regard to the amount to be endorsed on the note, not from price of paper, but from quality.

Q. 28. What was the difference between you?

A. I think something like two hundred dollars.

Q. 29. Have you a bill or account of paper furnished to Curran?

A. Yes, sir.

Q. 30. Will you annex a copy to your deposition as an exhibit?

A. Yes, sir.

(This is annexed as exhibit "B.")

Re-direct examination.

By Mr. Asay:

Ques. 31. At the time of the conversation with Mr. Manney referred to, had a bill been filed in the Recorder's Court, in the city of Chicago, on chancery side, to set aside a satisfaction of a mortgage prior to the one in controversy?

A. No. I can't tell about that.

Q. 32. Did you, in the conversation with Mr. Manney spoken of, did you make any further claim then for the six hundred and thirty dollars? If so, what was it?

A. My impression is that there was another mortgage, or some other claim against the property, of between five and six hundred dollars, unsettled.

Q. 33. Did you at that time claim it of him?

A. Yes, sir, I think we did.

Q. 34. Subsequent to conversation with Mr. Manney, was that mortgage litigated in the Recorder's Court of the city of Chicago, and did you have to pay money to redeem from sale by decree made from that court?

A. I can't tell. I did pay money to redeem, but don't know whether it was in litigation.

Q. 35. Did you, in either of these conversations, notify Manney that a claim had been set up that the satisfaction of that mortgage was a forgery, and had to be paid?

A. My recollection is that he did.

Re-cross-examination.

By Mr. Goudy:

Q. 36. Did you not claim that said prior mortgage had been satisfied and discharged?

A. No, sir.

Q. 37. When you speak of a part of one of the notes in controversy having been paid, do you mean to say that it was paid in any other way than by the delivery or shipment of paper to Curran under the contract in evidence?

A. No, sir.

Q. 38. What means have you of knowing that paper was delivered or shipped to Curran?

A. From our books. I was in the store at the time and attended to the shipping of it.

Q. 39. Did you attend to the shipping of all of it?

A. I believe I did.

Q. 40. Where was it shipped to, and to whom?

A. Shipped to Dennis Curran, at St. Louis.

Q. 41. Was there any subsequent agreement to the written one offered in evidence, in regard to the payment of the notes in controversy?

A. No, sir.

Q. 42. How do you arrive at the fact stated by you that the amount paid on one of the notes was six hundred and thirty dollars?

A. That was my recollection. We furnished paper to amount of about sixteen hundred and thirty dollars. One thousand was paid on the first note of $1,000, which we have. The other was to be endorsed on the notes as fast as it was shipped.

GEO. C. SMITH.

147 *Deposition of John B. Smith.*

Direct-examination of Mr. Asay:

Q. 1. What is your name, age, occupation and place of residence?

A. My name is John B. Smith. I am forty-seven years old. I am a merchant, and I live in Chicago.

Q. 2. Are you one of the firm of Bradner, Smith & Company?

A. I am.

Q. 3. Has any portion of the note due July 1st, 1863, and one of the notes in controversy been paid? And if so, what portion?

A. Six hnndred and thirty dollars and eighty-three cents has been paid.

Q. 4. How was it paid?

A. Paid in paper.

Q. 5. Delivered to whom?

A. Shipped to Dennis Curran.

Q. 6. How was the first note in this mortgage mentioned paid, if it has been paid, and by whom?

A. Paid by Bradner, Smith & Company, and in paper shipped to Dennis Curran, except what might have been delivered to him here.

Cross-examination.

By Mr. Goudy:

Q. 7. How do you know that a part of one of the notes in controversy has been paid?

148 A. These were the only notes I knew of in the transaction, and one of these, I suppose, had been paid to the extent I mentioned.

Q. 8. In the ordinary course of business, when a part of a note is paid, an endorsement is made upon it; state whether or not any was made in this case?

A. It would seem not from the note.

Q. 9. You have stated that the payment was made in paper, shipped to Dennis Curran; what means have you of knowing that such paper was shipped to Dennis Curran?

A. It is possible he got a little paper here, but the rest was shipped to him. I know this from our books.

Q. 10. Did you ship the paper yourself in person?

A. I may have shipped some, and I may have not; don't recollect.

Q. 11. Who kept your books?

A. F. P. Elliott, I think, kept our books at the time.

Q. 12. Who selected paper to fill an order, and shipped it?

A. Sometimes one and sometimes another.

Q. 13. Did the firm have clerks employed for that purpose?

A. Yes, sir.

Q. 14. Did Mr. Elliott, your book keeper, ever perform that kind of work?

A. Very seldom, if ever.

Q. 15. What time does the paper, which you say was pay-
149 ment of part of one of those notes in controversy, appear by your books to have been shipped?

A. Shipped in several lots, not all at once, in spring of 1863.

Q. 16. Do you know where the notes in controversy were at that time, or who held or owned them?

A. They were held alone by Mr. Curran.

Q. 17. How do you know that Mr. Curran held or owned them at that time?

A. He sent us one of them.

Q. 18. Which one did he send you?

A. The one first due.

Q. 19. You mean to say the first one of the three, or first in controversy?

A. First of three.

Q. 20. Is that all the knowledge you have on that point?

A. I don't think of anything more.

Q. 21. What is the whole amount of bill for paper against Curran?

A. By looking at our books, one thousand six hundred and thirty dollars and eighty-three cents, I think.

Q. 22. How much of that amount was applied in payment of first note, the one taken up?

A. One thousand dollars was to be applied.

Q. 23. Was any part of your account applied in payment of interest on first note?

A. I think not.

150 Q. 24. When was the first note surrendered?

A. I don't recollect; somewhere early in 1863, I should think.

Re-direct examination.

By Mr. Asay:

Q. 25. Do you know what the contract was under which the property in question was bought? If so what was it? state the same.

(Objected to by Mr. Goudy.)

A. My recollection is that we bought the property for three thousand dollars; we were to pay in paper by the first of May. He agreed specially to take all by the first of May; and he was not to order any more of any one kind than we happened to have on hand.

Q. 26. State whether the paper marked exhibit "B" shown to you is the statement of account sent by Bradner, Smith and company of paper furnished by them to him, and to which was to be endorsed on said notes in payment of the same?

Q. It is.

Q. 27. You have previously testified that the amount of the bill of Bradner, Smith and Company against Curran amounted to $1,637 83. Will you please state how this is so, when the statement of the account referred to in the last interrogatory called for but $1555 83.

A. $1,555 83 is the correct sum for paper furnished and
151 $75 00 which we charged to the account of Dennis Curran was for a tax title against the estate referred to in the bill, which we paid.

Q. 28. State whether you are personally acquainted with the handwriting of said Curran, and have been accustomed to receive letters from him, and know his handwriting when you see it?

A. I am acquainted with it; have received letters from him frequently. I know his handwriting.

Q. 29. State whether the letters here shown to you, respectively marked exhibit C to exhibit C[6] inclusive, and purporting to be in the handwriting of said Dennis Curran, are signed by him, are in his handwriting; and if you say they are, state whether said letters were received by the firm of Bradner, Smith & Company, or by George C. Smith for the firm of Bradner, Smith & Company.

A. They are letters written by him, and those to George C. Smith were for the firm of Bradner, Smith & Company; those addressed to the firm were received by the firm.

Q. 30. State whether the letters shown to you marked Exhibit "D," and purporting to be written by said Curran, is in his handwriting, and if so, whether the same was received by said firm.

152 A. It is and was.

Q. 31. Look at this note, a copy of which is marked exhibit "E" and attached to the deposition, and state whether it is the same note referred to in the letter marked Exhibit "D" referred to in the last interrogatory, and whether it was received by Bradner, Smith & Company with said letter.

A. That is the same note, and was received in the said letter.

Q. 32. State whether said note has been paid.

A. It has been paid by Bradner, Smith & Company.

Q. 33. State whether or not the ten receipts shown to you and marked exhibit "F" are the receipts given to you by the Chicago and St. Louis R. R. Co., and Chicago and Rock Island R. R. Co. respectively, for the paper shipped by you to the said Curran as hereinbefore stated.

A. These are the receipts.

(The complainants object to the letters marked exhibits "C" from 1 to 6, inclusive, and letter marked exhibit "D," and to the freight receipts.)

Re-cross examination.

By Mr. Goudy:

Q. To whom did you pay the money for the tax title?

A. I don't recollect his name.

Q. Did you obtain a certificate of purchase or deed?

A. The certificate of purchase, I suppose.

153 Q. Will you please furnish a copy of the certificate of purchase?

I will if I can find the certificate.

JNO. B. SMITH.

Exhibit "A."

Whereas George C. Smith, of Chicago, Cook county, state of Illinois, has this day purchased of one James McCartney, of Deerfield, Lake county, State aforesaid, lot eleven (11) block sixty-one, (61,) in the school section, addition to Chicago, on which said lot one Denis Curran, of said city of Chicago, has a mortgage for three thousand dollars made by said McCartney, and recorded in book sixty, (60,) page seventy-eight, (78,) in the recorder's office of Cook county aforesaid; now, therefore, it is agreed by said Curran that said Smith may have the right to pay up said mortgage indebtedness within three months from this date, and oblige the said Curran to cancel said mortgage of record. Said payment to be made by said Smith in the manner and form as mentioned and agreed in a certain agreement bearing even date herewith between the said Curran and Mess. Bradner, Smith & Co., of the said city of Chicago.

DENIS CURRAN.

February 2nd, 1863.

154 This agreement, made this 2nd day of February, A. D. 1863, between Denis Curran and Bradner, Smith & Co., all of Chicago, Cook county aforesaid, witnesseth: That said Bradner, Smith & Co. have sold, and hereby sell to said Curran three thousand dollars' worth of wrapping and other paper, as shall be ordered by said Curran from time to time; said paper to be and correspond in all respects, in quality, size and price, with the samples this day delivered to said Curran by said Bradner, Smith and Co., price being thereon marked by said Bradner, Smith & Co. It is further agreed that said Curran shall have the right to pay for the same by endorsements of value of paper so received at any one time upon certain notes secured by mortgage upon lot eleven, (11,) block 61, school section, which said mortgage said Curran holds, and which said lot said Bradner, Smith & Co. have this day bought; said paper to be delivered upon the orders of said Curran, and if delivered at any other place than at the store of said Bradner, Smith & Co., in Chicago, the said Curran shall be charged with cartage to such place or places. It is further agreed that said Curran shall order all of said paper within ninety days from this date, but shall not have the right to order any one kind
155 of paper at any one time in larger quantities than said Bradner, Smith & Co. shall have on hand at the time of receiving such order or orders.

DENIS CURRAN.

[5-cent. rev. stamp, cancelled.]

Exhibit "B."

CHICAGO, *Nov.* 20, 1863.

Mr. Dennis Curran

To Bradner Smith & Co., Dr.

Wholesale paper warehouse, No. 133 South Water street.

1863.

Feb'y	2.	To m'dse		95 00
	10.	" "		30 00
	11.	" "		63 82
	13.	" "		24 80
	17.	" "		4 75
	18.	" "		45 83
M'rch	9.	" "		35 63
	25.	" "		288 71
Ap'	9.	" "		540 39
May	11.	" "		426 90
				$1,555 83

Ex. "C."

ST. LOUIS, *March* 24, 1863.

Mr. George C. Smith:

Sir: I have rented me a store No. 428, Broadway, St. Louis, Mo., is the letters is caryed round heer derect to me at the above
156 No. 428, and plais forward to me the folling order, to begin with is I mean to begin a ernest, mack no delay in shiping.

1000 lbs. of D crown W B 3¼ c.
1,000 lbs. of mediam W B 3¼ c.
1,000 lbs. of M Doncrolt 3½ c.
1,000 lbs. of 3 Q mediam dark color 3 c.
1,000 of Don crown straw 3 R 3 c.
1,000 lbs. of 3 R crown Straw 3 c.
20 rame of Winnebago Don, 8 10 off.
20 reame Winibago mediem 6 10 p. off.
20 Winibago cro reame 4 10 off.
20 bundls crown manilla 65 c.
20 bundls cap manilla 40 c.
20 bundls 18 x 26, 8 per ream.
500 lbs. of ham paper 5 c.

Sir: if you would be so oblidgin as to see which of the R. Roads would bring it the cheapist to St. Louis; the Rock Island has watter conexion to heer but the St. Louis is the most derect if the would work is cheap is the other road, but forward the present order by the St. Louis road, is I want to mack a beginning. I am macking araingments to get my famley thrugh to heer is soon is posibill. D. C. St. Louis is mark a nuff on the packigs.

Respectfully yours,

DENIS CURRAN.

Exhibit "C."

ST. LOUIS, *April* 20, 1863.

157 Messieurs BRADNER, SMITH, & Co.,

GENTLEMEN: I have been expecting with every mail for the past week that invoice that you promest to send is that one that was in the box is incomplete and erar. Plais send invouce es you ship to be geting marchindise without having it to call them over by, laves me in a awkward position, the one 9½ reame of Middlesea, the are onley 8½ the 10 reame of mid drug is marked 374 lbs is but 274 lbs., the ham paper in the first invous is 13 lbs. short of the mark, it is unplesent in ether sides to have thais mistacks to cancel, I will in a few days send a order for more, and sum samples of kinds of paper that the are inquires after that 90 bundls cro straw marked M, and the 87 bundls M Dor is no such paper is the sampil or what yo siped to me first, it is corse and heavy, has not got the finish of the sample, you can compaire with the sample if not mailed plase mail the invouce to me hoping that the will be no moor delay of the kind.

Respectfuly youris,

DENIS CURRAN,
No. 428 *Broadway, St. Louis,*

D. Curran, St. Louis, April 20, '63.
D. Curran, May 1863.

ST. LOUIS, *May* 4, 1863.

158 Messrs. BRADNER, SMITH & Co.

GENTLEMEN: I wish you to forward to me by R. Island R. and Illinois River packet Co.; M D cro. straw 2,000 lbs. in 20 lb. bundls; 3 R cro straw 4,000 lbs. in 7 lbs. bundles or 16 to the quire; 3 R. doubil cro straw 4,000 lbs. in 20 lbs. buudls; 3 R. meadim 15 x 20 4,000 lbs. in 15 lbs. to bundl, 16 to qr. the buchers and the beakers and a few small grocerys is the only custmers I have got is yet, the complain that it is rather a hevey payer if you could get me 3 R. crown and a meadim made a shaide liter in body it will sell to beakers and buchers much better, the are a menalla paper that I have a sampil of marked 8 per reame. I ordered sum twist and you sent me none, it was 18 x 26 and [and] that menala 18 x 24, 12½ lbs. to reame should have been 13 c., you have charged me 15 c.; I want you to send one sampil of white wrapping used by drugest, and blue and pink paper that is used by lucifer match mackers with the hole sale and retail prices marked on ech, if the are anything in the way of samples that you would wish to send me you can do so. When I was in Chicago I sold to a Mr. Brawen on Canal st. the following:

15 bundls of Winnibago Don 8	1,500
10 bu. of meadim 6	750
13 bu. of 3 Q. medim straw 6	975
	3,225

159 In settling with my dauther he sets the above dowin at sum of 2,149. I have sent the money thrugh to my dauther to pay him and get the paper back, I have ordered it to be delivered at your were house; be plaised to receive and forward to me a long with other stock and you will much oblige,

Youris resptfuly,

DENIS CURRAN.

ST. LOUIS, *May* 30, 1863.

Messrs. BRADNER, SMITH & Co.,

GENTLEMEN: Yours of the 28th is to hand in replay, it was understud between George C. and I, that I was not to be limited to thais ninty days to tack up the whole a mount, if it was, it was quite easy matter for me to order the hole of it at wonct. But I acted on the prencipil to tray to sell is much is I could of the fine or high priced paper, but to mack amends for the past you can forward the sum totel of the ballance due on thais nots in as few days is you have a mind to dow it in, by the R. I. R. Road and Illinois River Packet company, wrapper paper in quantitys, is

200 bundls menella, 40 c. per budl.
100 bundls menella, 65 c.
4,000 lbs. W. B. D. crown, 3¼ c.
4,000 lbs. W. B. mediam, 3¼ c.
160 2,000 lbs. M. crown straw, 3½ c.

The ballance in 3 Q-medium and 3 Q crown straw, 3 c. in equal quantity of ech kind that 65 c. menella and the W. B. that you sent to me is a damaged paper, and if you send aney more of that damaged kind I will not except of it. Your ham paper is havy the do not use such in this market, if you felt roofing paper plais send a sampil and your price, I may propbil sell a few tuns of it, as to the due bill that I want for thais nots is the above-mentioned forwared to redime them, your Winebago wrappin paper is too light in couller, if it was a dark shaid it would sell redley, but is your sime to be in a hurry for thais nots send forward is dericted is no other kind of a due bill will get thais notes from me.

Yours most respectfully,

DENIS CURRAN.

SAINT LOUIS, MISSOURI, *Sep.* 3, 1863.

D. Curran, St. Louis, 30 May, 1863.

Mr. GEORGE C. SMITH: Your letter of the 14th of August very trnly remarks and point out the many dificults that are in the way, and our want of confidence in each other. In looking over the contract, I do not altogether blame you for your caution as it
161 points out to me the property is at your risk to, I receive it an endorse on those notes. And as you very truly said it would take me away from business to have to attende to it, I have

sold the two notes of James McCartney's to a merchant under the contract, he says he will take paper from you under the contract and samples. I have indorsed on the second note the amount I think I owe you, if they be any difference in our calculations you will have to look to me. I will settle the matter.

Yours very respectfully,

DENIS CURRAN.

Is you received the first note of one thousand dollars. ' I indors on the second note faive hundred and 12 dollars and 15 c. to your credit. If I am in errer I am opin to mack it all right.

SAINT LOUIS, MISSOURI, *Sept.* 12, 1863.

Mr. George C. Smith:

SIR: I have been waiting since the 3rd inst. to get your reply to my letter adressed to you of that date, notifying you that I sold the 2 notes of James McCartneys if you would send me a bill of what I owe you for the paper I received, so that I could indorse it on the note that is overdue before the murchant that bought them leaves the city as you will have to look to me for all out side of those notes.
162 I hope you will reply in good time. P. L. Sherman will attend to any business that I will have to do at Chicago.

Respectfully yours,

DENIS CURRAN.

Exhibit "D."

ST. LOUIS, *May* 25, 1863.

Messrs. Bradner Smith & Co.:

GENTLEMEN: Yours of the 21st is to hand in replay, I send inclosed the first due of thois nots, the second is little over one-half paid up and I will forward them one after the other is soon is the are value received, it is no more than resnibill, I should hold the nots to I get my pay, as to note cap, and minalla paper, your figers is too high a price for this market, ruffing felt paper is in good demand heer if given at right kind of figers the can be sum tuns of it sold heer, is I will be sending you a order in a few days if you send me a sampil of it, and other sampls that I have not. I have had some inquires after paist board, all the difrince I can see in that last en paper from the three cent paper is the mark of the X. I am dowing my best to sell hevey paper, it tacks sum tim to get aquent with them that
163 buy such, the are all loocking for a fall in price of menella and hevey wrapin. In your next communication let me know the price of rags there, my next will be a week from now, and propbley I may have got sum orders for some hevy wraping be that time.

Respectfully youris,

DENIS CURRAN.

Let me know what you could let me have such class invlops is one containing this by the thousand.

Exhibit "E."

[Copy.]

$100. CHICAGO, *July 1st*, 1861.

One year after date I promise to pay to the order of Dennis Curran, one thousand dollars with interest at six per cent. per annum value received.

JAMES McCARTNEY.

Endorsement on back of said note. "Interest paid up. Dennis Curran."

Exhibit "F."

Received of Bradner, Smith & Co. the following articles in apparent good order on C. & St. L. R. R., to be delivered as addressed.

CHICAGO, *March 25th*, 1863.

Dennis Curran, 428 Broadway, St. Louis, Mo., 98 b'dl's paper.

J. C. M. MULLER.

164 Received of Bradner, Smith & Co., the following articles in good order on C. & St. Louis R. R., to be delivered as addressed.

CHICAGO, *March* 25, 1863.

Dennis Curran, 428 Broadway, St. Louis, Mo., 130 b'dl's paper.

J. C. M. MULLER.

Received of Bradner, Smith & Co. the following articles in good order on C. & St. Louis R. R. to be delivered as addressed.

CHICAGO, *March 26th*, 1863.

Dennis Curran, 418 Broadway, St. Louis, Mo., 130 b'dl's paper.

J. C. M. MULLER.

Received of Bradner, Smith & Co. the following articles in good order on C. & St. Louis R. R., to be delivered as addressed.

CHICAGO, *March 26th*. 1863.

Dennis Curran, 428 Broadway, St. Louis, Mo., 78 b'dl's paper.

J. C. M. MULLER.

Exhibit F.

Received of Bradner, Smith & Co. the following articles in good order on C. & R. I. R. R., to be delivered as addressed.

CHICAGO, *May* 9, 1863.

165 Dennis Curran, 428 Broadway, St. Louis, care Ill. Packet Co. Peoria:

933 b'dl's paper. C. & R. I. R. R. Co., May 9, 1863. Received in apparent good order. Not responsible beyond stations on this road. Chicago.
This company responsible to Peoria only.

Received of Bradner, Smith & Co. the following articles in good order on C. & R. I. R. R., to be delivered as addressed.

CHICAGO, *April 9th*, 1863.

Dennis Curran, 428 Broadway, St. Louis, care Ill. River Packet Co., Peoria, Ill.

145 b'dl's paper. C. & R. I. R. R. Co., April 9, 1863. Received in apparent good order. Not responsible beyond staticns on this road. Chicago.
This company responsible to Peoria only.

Received of Bradner, Smith & Co. the following articles in good order on C. & R. I. R. R., to be delivered as addressed.

CHICAGO, *April 10th*, 1863.

Dennis Curran, 428 Broadway, St. Louis, Mo., care Ill. River Packet Co., Peoria:

131 b'dl's paper. 1 short. C. & R. I. R. R. Co., Apr. 10, 1863. Received in apparent good order. Not responsible beyond stations on this road. Chicago.
This company responsible to Peoria only.

166 Received of Bradner, Smith & Co. the following articles in good order on C & R. I. R. R. to be delivered as addressed.

CHICAGO, *Ap'l 10th*, 1863.

Dennis Curran. 428 Broadway, St. Louis, Mo., care Ill. River Packet Co., Peoria, Ill.

95 b'dl's paper. 2 cases. 6 b'dl's Manilla paper. C. & R. I. R. R. Co., Apr. 10, 1863. Received in apparent good order. Not responsible beyond stations on this road. Chicago.
This company responsible to Peoria only.

Received of Bradner, Smith & Co. the following articles in good order on C. & R. I. R. R., to be delivered as addressed.

CHICAGO, *Ap'l 9th*, 1863.

Dennis Curran, 428 Broadway, St. Louis, Mo., care Ill. Packet Co. Peoria, Ill.

210 b'dl's paper. C. & R. I. R. R. Co., Apr. 9, 1863. Received in apparent good order. Not responsible beyond stations on this road. Chicago.

This company responsible to Peoria only.

Received of Bradner, Smith & Co. the following articles in good order on C. & R. I. R. R., to be delivered as addressed.

CHICAGO, *Ap'l 9th*, 1863.

167 Dennis Curran, 428 Broadway, St. Louis, Mo., care Ill, River Packet Co., Peoria. Ill:

245 bdls. paper. C. & R. I. R. R. Co., Apr. 9, 1863. Received in apparent good order. Not responsible beyond stations on this road. Chicago.

This company responsible to Peoria only.

United States Circuit Court, northern district of Illinois.

JOHN T. MANNEY *et al.*
vs.
JAMES MCCARTNEY *et al.* } In chancery.

STATE OF ILLINOIS, *County of Cook, City of Chicago, ss*:

I, Thomas S. McClelland, a notary public in and for the city of Chicago, county of Cook, and State of Illinois, do hereby certify that on the 12th, 13th, and 22nd days of December, A. D. 1866, at the office of Goudy & Chandler, 126½ Dearborn st., Chicago, by agreement of Messrs. Goudy & Chandler, solicitors for complainants in the above-entitled cause, and Messrs. Wilson & Asay, so-
168 licitors for defendants in the same cause, the foregoing depositions of George C. Smith and John B. Smith, taken on behalf of said defendants, were reduced by me to writing, and in their presence, they being first duly sworn to testify the truth, and that the said George C. Smith and John B. Smith subscribed the same in my presence.

In testimony whereof I have hereunto set my hand and notarial seal this 22d day of December, A. D. 1866.

[SEAL.] THOMAS S. MCCLELLAND,
Notary Public.

[5-ct. int. rev. stamp, cancelled.]

169 On this day, to wit, the 7th day of March, A. D. 1868, in the record of the proceedings of said court in said entitled cause appears the following entry, to wit:

Hearing and judgment.

JOHN T. MANNY, GEORGE S. DRAKE and WILLIAM DOWNING, *vs.* JAMES MCCARTNEY, GEORGE C. SMITH, FRANK M. KERWIN, EDWIN BLACKMAN, MYRON H. NORTON, CHARLES A. NORTON, RODERICK F. FARRELL	Chancery.	Original bill.

And

GEORGE C. SMITH *vs.* JOHN T. MANNY, GEORGE S. DRAKE and WILLIAM DOWNING.	Cross-bill.	

This cause having heretofore been heard upon the original and amended bills, the answer of George C. Smith thereto, and replication, the cross-bill answer of John S. Manny, George S. Drake and William Downing thereto, and replication, and the evidence,
170 depositions, and exhibits, and the court being now sufficiently advised in the premises, doth find that the sum of one thousand five hundred and seventeen dollars and ninety cents, due to the complainants upon the notes and mortgage described in the original bill of complaint, in a lien and incumbrance on the real estate and lot described in said mortgage and the original bill, and that default was made in the performance of the condition of said mortgage before the filing of the original bill, by a failure to pay the sum then due upon said notes; and it appearing to the court that the defendant, James McCartney, Edwin Blackman and Myron H. Norton, were served with a subpœna to be and appear herein on the first Monday of July, A. D. eighteen hundred and sixty-four, and that they have failed to appear or answer, plead or demur to the
171 original bill of complaint;

It is therefore ordered, adjudged and decreed that the defendants, James McCartney and George S. Smith, in the original bill, and the complainant, George S. Smith, in the cross-bill, pay to the complaintants, Manny, Drake and Downing, or their solicitors, Goudy & Chandler, or pay and bring into court for the use and benefit of the said complainants in the original bill, the said sum of one thousand five hundred and seventeen dollars and ninety cents within twenty (20) days, and that they also pay all the costs herein within the said time; and when such payments are made within the same time, the same shall be held and deemed a redemption of the premises to wit: lot numbered eleven, in block number sixty-one, in the

school section addition to Chicago, in the county of Cook,
172 State of Illinois, from the mortgage lien and incumbrance, and the same shall be discharged from all claim arising under the said mortgage; but if the defendants shall neglect or fail to pay said sum and the costs or either, or any part thereof, within the period of twenty (20) days, then the defendants to the original bill who have been served with process, and all persons claiming by, through, or under them, or any or either of them, shall be, and are hereby barred and foreclosed from all equity of redemption from said mortgage, and of all right, title and interest therein, and the title to said premises shall be, and is hereby declared to be absolute in fee simple in the said complainants as the assignees of the said Dennis Curran; and the said George C. Smith shall, within ten days after such default, make, execute and acknowledge a deed conveying said premises,
173 with the appurtenances thereunto belonging, to the complainants in the original bill of complaint in fee simple; and if he neglects to make and deliver such deed, then Henry W. Bishop, jr., esq., one of the masters in chancery of this court shall, and he is hereby appointed and directed to make and deliver such deed to said complainants for and in behalf of the said George C. Smith, which shall vest a perfect title in fee in said complainants, free from the claim of the said defendants to the original bill, their heirs or assignees, and that thereupon the possession of said premises be surrendered to the said Manny, Drake and Downing, and a writ of assistance may issue to put them in such possession.

174 On this 10th day of July, A. D. 1868, came William Downing and William C. Goudy, and filed a bond for appeal, which said appeal bond is in the words and figures following, to wit:

Supreme Court of the United States.

Appeal bond.

Know all men by these presents, that we, William Downing and William C. Goudy, are held and firmly bound unto James McCartney and George C. Smith, in the sum of five hundred dollars, to be paid to the said James McCartney and George C. Smith, executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this first day of July, A. D. 1868.

WILLIAM DOWNING.

175 Whereas the above-named William Downing has prayed an appeal to the Supreme Court of the United States to reverse the decree rendered by the Circuit Court of the United States for the northern district of Illinois in chancery sitting, in a cause wherein John T. Manny, George S. Drake, and said William Downing are complainants, and the said James McCartney and George C. Smith, and F. M. Kerwin, E. Blackman, M. H. Norton, and C. A. Norton are defendants.

Now, therefore, the condition of the above obligation is such, that if the above-named William Downing shall prosecute his said appeal to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] WILLIAM DOWNING.
[SEAL.] W. C. GOUDY.

We are satisfied with this bond.

ASAY & LAWRENSE.

Approved—

THOMAS DRUMMOND.

Endorsed: Filed July 10th, 1868. Wm. H. Bradley, cl'k.

176 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the Circuit Court of the United States for said district, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in chancery in said entitled cause, wherein said John T. Manny et al. are complainants, and the said James McCartney et al. are defendants in the original bill, and the said George C. Smith is complainant, and the said John T. Manny et al. are defendants in the cross bill, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at my office, in the city of Chicago, in said district this fifth day of December, A. D., eighteen hundred and sixty-eight, and of the independence of the United States the ninety-third year.

WILLIAM H. BRADLEY, *Clerk.*

Supreme Court of the United States.

WILLIAM DOWNING

—*vs.*—

JAMES McCARTNEY ET AL.

Appeal from the Circuit Court for the Northern District of Illinois.

POINTS AND AUTHORITIES FOR THE APPELLANT.

W. C. GOUDY, *Counsel for Appellant.*

Beach & Barnard, Steam Print, 122 & 124 S. Clark St.

Supreme Court of the United States.

WILLIAM DOWNING

—*vs.*—

JAMES McCARTNEY ET AL.

Appeal from the Circuit Court for the Northern District of Illinois.

POINTS AND AUTHORITIES FOR THE APPELLANT.

I.

STATEMENT OF THE CASE.

On the 3d day of June, 1864, Manny, Drake & Downing filed a bill to foreclose a mortgage, in the court below, against James McCartney, the mortgagee, and others claiming some interest in the mortgaged premises, which was answered by only one of the defendants, George C. Smith.

It is not necessary to look at the original bill and answer, because, on the 26th of July, 1865, an amended bill, which is a substitute for the original, was filed, and this was answered by the defendant, George C. Smith. No other defendants appeared.

The case presented to and decided by the court below, is to be found in the amended bill, (Printed Record, pp. 15–18,) the answer of George C. Smith, (Ibid, pp. 18–25,) the replication thereto, (Ibid, pp. 25, 26,) and the evidence, (Ibid, pp. 37–61.)

There is a cross bill and answer in the record, but it is not material to notice them in stating the facts. Almost the whole of the evidence may be disregarded in this court, as it relates chiefly to a matter about which no question arises in this court.

From the amended bill, the answer of George C. Smith, the replication and evidence, I make the following statement:

On the 1st day of July, 1861, James McCartney executed three promissory notes, payable to the order of Dennis Curran, each for $1,000, payable in one, two, and three years from the date thereof, with six per cent. interest, payable annually. And, for the purpose of securing the payment thereof, McCartney executed a mortgage to Curran, on Lot 11, Block 61, School Section addition to Chicago, with a provision that default in the payment of any one of the notes should authorize a foreclosure and payment of the whole from the proceeds, which was recorded August 19, 1861.

The lot was, on the same day, sold and conveyed by Curran to McCartney, and the notes were given for part of the purchase money.

The first note was paid, and the other two were sold and assigned to Manny, Drake & Downing.

The prayer of the bill was to foreclose the mortgage because of the default in the payment of these two notes.

McCartney was made a defendant. George C. Smith, Frank McKerwin, Edwin Blackman, Myron H. Norton, and Charles A. Norton were also made defendants, because they claimed some interest in the premises, which, it is alleged, was subsequent to the lien of the mortgage.

George C. Smith, in his answer, admitted the execution of the notes and mortgage, and the assignment of the two last notes to Manny, Drake and Downing.

Smith's interest in the premises was derived from McCartney, who sold and conveyed to him, Feb. 2, 1863, subject to the mortgage given to Curran.

The defence interposed by Smith was as follows, to-wit:

First. Curran, while he was the owner of the property, on August 31, 1859, executed a mortgage to Edward Hand, to secure the payment of a note for $600, which was duly recorded, and upon the records there appeared to be a release in writing, purporting to be signed by Hand, in the manner provided by the statute of Illinois, but which the answer alleged was a forgery, and it was averred that the note secured was not paid, nor the mortgage released. This note and mortgage were assigned to Roderick F. Farrel, who, in April, 1864, filed a bill in the Recorder's Court of Chicago against Curran and Smith, to cancel the release and foreclose the mortgage, and a decree was rendered therein, June 30, 1864, requiring Curran and Smith to pay $647.90, and, in default, that the premises be sold. The money was not paid, and the lot was sold, Sept. 1, 1864, to Farrel, for $714.74, to whom a

certificate of purchase was issued, stating that, unless the premises were redeemed before December 2, 1865, he would be entitled to a deed. Manny, Drake and Downing purchased this certificate from Farrel, and paid him the sum bid, and the certificate was assigned to them.

Before the expiration of twelve months from the sale to Farrel, Smith, being the owner in fee of the lot, subject to the incumbrances, redeemed from the sale, according to the provisions of the statute of Illinois, by paying to the Master who made the sale the sum bid, with ten per cent. interest, and the Master issued a certificate of redemption to Smith, which was recorded.

Subsequently, Manny, Drake and Downing, as the assignees of the certificate of purchase, received the redemption money from the Master.

The two notes described in the bill in this case, were assigned by Curran to Manny, Drake and Downing, Sept. 30, 1863, which was before the bill was filed in the Recorder's Court, and while the mortgage to Hand was apparently discharged. They took the note, without recourse, after an examination of the record, and ascertaining the value of the lot, believing that there was no other incumbrance on the property. Manny, Drake and Downing were not made parties to the Farrel suit, but they knew it was pending when they filed the bill to foreclose in the United States Circuit Court, and Farrel was not a party to this suit.

Upon this state of facts, the defendant Smith, in his answer, sets up his claim in the following words, to-wit:

"And this defendant, further answering, saith and

" humbly shows unto this honorable court, that by re-
" deeming said real estate from said sale, made by said
" Master, he became entitled to the payment of said sum
" so paid by him for such redemption, and that he is equit-
" ably entitled to the benefit of said mortgage so originally
" given by said Curran to said Hand, and that in equity
" and good conscience he ought to be allowed and per-
" mitted to hold said mortgage as a lien and incum-
" brance prior to the complainants, upon said premises,
" until he is reimbursed and repaid for such sum as he paid
" to redeem from said sale, and also for his expenses in
" that behalf sustained, said mortgage being a prior legal
" and existing claim and lien upon the same premises, as
" in said complainant's amended bill specified, and being
" executed, delivered and recorded before the said mort-
" gage given to said Curran by said McCartney, and by
" Curran assigned and transferred to the complainant as
" in said bill specified, and never having been discharged
" or satisfied except by this defendant. As hereinbefore
" stated, this defendant never meaning or intending to
" discharge and forever extinguish the same, or to release
" said premises therefrom."

Second. On Feb. 2, 1863, at the time the lot was conveyed by McCartney to Smith, a contract was made by Curran with Bradner, Smith & Co., the defendant Smith being one of that firm, to pay the three notes, in wrapping and other paper within 90 days, and under this contract, and before the two notes were assigned by Curran to Manny, Drake & Downing, paper was delivered to Curran to the amount of $1,555.83, and the first note was in this manner paid, and it was surrendered by Curran to Smith.

No endorsement was made on either of the other notes, and they were sold for goods equal in value to their face, and assigned by Curran to Manny, Drake & Downing, without any notice to them of the existence of such a contract, or of any set off or payment. Curran claimed that he was not bound to endorse the value of the paper on the notes, and he disputed the sum claimed.

Third. The answer alleged that the rest of the paper was not delivered because of the fault of Curran, and therefore denied any liability on the part of Smith to pay in money, but the proof did not sustain this position, but on the contrary, it appeared that Bradner, Smith & Co. had refused to deliver more paper on Curran's order.

Fourth. In order to reach the notes in the hands of the assignees, the answer alleged that they were transferred without any consideration, with notice of the equities between Curran and Bradner, Smith & Co., and after they were due. But it appeared that Manny, Drake & Downing paid full value without notice, and that they were assigned after one note was due and before the other had matured.

Upon these facts the court below, on the 7th March, 1868, rendered a decree requiring McCartney and Smith to pay Manny, Drake & Downing, or their solicitors, or pay into court, $1,517.90 within 20 days, and the costs, and declaring that such payment should be a redemption of the lot described in the mortgage from the mortgage lien, and if such payment was not made foreclosing the equity of redemption and ordering a deed to be made by Smith to Manny, Drake & Downing.

From this decree William Downing, one of the complainants, appealed to this court.

The full amount due on the two notes, principal and interest, at the time the decree was rendered, without abatement, was $2,802.50. There was due on the first note when it was paid, May 11, 1863, $1,111.66. Add these two sums together and we have a total of $3,914.16. The amount of the paper account was $1,555.83, and the amount paid by Smith to redeem from the sale under the Farrel decree was $785.88: add these together and we have $2,341.71. Deduct $2,341.71 from $3,914.16 and we obtain a balance of $1,572.45. This about $60 more than was allowed the complainants, but we have no ttaken into the account interest on the sum paid to redeem, or $75 paid by Smith to remove tax title, and perhaps the court allowed one or both. While we cannot exactly ascertain how the oourt fixed the sum of $1,517.90 as the amount due the complainants, *we can see that the court allowed the whole of the paper account and the sum paid to redeem from the sale to Farrel, as credits and payments on the notes held by the complainants.*

The appellant insists that the court below erred in fixing the sum due under the mortgage at only $1,517.90.

II.

Points of Law.

1. *The complainants below were entitled to a decree against McCartney for* $2,802.50 *the full amount due on the two notes.*

James McCartney was the maker of the two notes of $1,000 each, held by Manny, Drake & Downing, and he executed the mortgage to secure them. McCartney sold and conveyed the mortgaged premises to George C. Smith, subject to the mortgage. Curran, to whom the notes were given, did not release the maker of the notes; Manny, Drake & Downing did not discharge him; Smith was not substituted as the debtor by either of the holders of the notes. Curran agreed with Bradner, Smith & Co., when the lot was sold and conveyed by McCartney to Smith, to receive payment in paper, but McCartney was not a party to such an agreement. The effect of this agreement was to allow Smith to discharge the incumbrance in a particular manner, and as far as it was executed, the lot would be discharged. What effect did it have on the personal liability of McCartney as maker of the notes? None whatever. The most that could be claimed is, that Smith by his purchase subject to the incumbrance, and by his agreement with the then holder of the notes to pay in paper, became the agent of McCartney, and as far as paper was delivered the notes should be discharged. In this view, only $1,555.83, the amount of the paper delivered, could be deducted from $3,914.16, the amount due on the three notes, which would leave $2,358.33, for which McCartney

would be personally liable, and the decree should have been for that sum against him.

There is another view, which I believe to be the true one:

McCartney was a party defendant, and was served with process. He failed to appear; by his default he admitted all the allegations of the bill, and among them he admitted an indebtedness on the two notes for the full amount of principal and interest. The defendant Smith had no interest whatever in the suit except to protect the lot, of which he was then owner.

The complainants, therefore, were entitled to a decree against McCartney for $2,802.50, to be paid in some fixed time, and unless it was paid by McCartney, or such part of that sum as was a charge against the lot in the hands of Smith was paid within a time named in the decree, then the equity of redemption should be foreclosed.

The object of making McCartney a party was to state an account and collect the sum due; the object of making Smith a party was to determine how far the mortgage was a lien on the lot and subject it to such lien. The complainants were entitled to a decree *in personam* against McCartney, and *in rem* against the mortgaged premises then owned by Smith.

The court below erred in disregarding this distinction, and treating McCartney and Smith as equally liable, and having a right to redeem upon equal terms.

2. *The defendant Smith was not entitled to credit for the sum he paid to redeem under the Statute from the sale to Farrell.*

Smith was the owner in fee of the lot, subject to the two

incumbrances, namely, the mortgage to Hand, executed in 1859 by Curran to secure a note of $600, and the mortgage to Curran, executed July 1, 1861, by McCartney to secure the three notes of $1,000 each.

The record in regard to the first mortgage to Hand is very meagre. The answer of Smith makes some statements in regard to it, but the answer is not under oath, and is not evidence. The *only* evidence of the existence of the mortgage to Hand or any release entered of record is a stipulation to be found on pages 37, 38, Printed Record. From this stipulation it appears, that in April Term 1864 of the Recorder's Court, Farrell, assignee of the note to Hand, secured by the mortgage purporting to be released, filed a bill against Smith and Curran, *alleging* that said release was a forgery and *seeking* a decree of foreclosure: that June 30, 1864, a decree of foreclosure was rendered for $647.90.

The only other testimony from which any conclusion can be drawn in regard to the release is that of Drake, (Printed Record, 43) from which it appears that the records did not show any such incumbrance in September, 1863, when the complainants bought the two notes of Curran.

While the decree in the Recorder's Court would be conclusive evidence against Smith and Curran of the existence of the mortgage lien, and if there was a release of record that it was invalid, *yet it is no evidence whatever against Manng, Drake and Downing*, because they bought the notes of Curran eight months before the bill by Farrell was filed, for a valuable consideration without notice, and were not parties to Farrell's bill.

Therefore, the court erred in deducting any sum from the amount due on the notes on account of the redemption from sale under the Farrell decree.

There was an entire failure to prove the averments of the answer in regard to the Hand mortgage, and no decree could be predicated on them.

If full proof of the allegations of the answer in this respect had been made, the decision of the court is none the less erroneous. I may with safety admit all of these statements.

Was there any equity as between Smith and the complainants in the original bill, which would cast the burden of the Hand mortgage on Manny, Drake & Downing?

The most that can be said is, that Smith purchased from McCartney without any notice that the Hand mortgage was an incumbrance. He took a covenant from McCartney against all incumbrances except that of the mortgage to Curran, and there is no proof that such covenant is not a complete protection to Smith.

On the other hand, Manny, Drake & Downing purchased the two notes upon the faith that there was no other incumbrance on the property, and took them without recourse. It the parties held incumbrances of equal grade, equity would, in these circumstances, cast the burden of the Hand mortgage, when it was ascertained that it was not discharged, upon Smith, because he could save himself by his recourse on McCartney, while the other parties could not save themselves. But these parties do not occupy any such positions. Smith was the owner of the property, and took it subject to the mortgage to Curran. When Farrell, assignee of Hand, succeeds in enforcing a prior lien against the lot, that furnishes no reason in law or equity why it should be charged to the account of Manny, Drake & Downing, or of their assignor, Dennis

Curran. It is quite true that the holder of the note secured by the Hand mortgage might have enforced it, upon proof of the fact that it was not discharged, against Manny, Drake & Downing as subsequent mortgagees; but in that case they could have charged the sum thus advanced to satisfy the first mortgage to Smith, the owner, because he was the owner subject to both incumbrances. But the Hand mortgage was not enforced against Manny, Drake & Downing; the holder of that debt enforced it directly against Smith, whose property was ultimately liable.

It is possible that the counsel for the appellee may claim that the sum due was the Hand note and mortgage could be set off against the notes in Curran's hands, and that Manny, Drake & Downing, having taken one of the notes after due, took them subject to such equity. If such a position is assumed, I answer, that there is nothing whatever to connect Curran with the release alleged to be forged, and it does not appear that he conveyed to McCartney so as to make him liable to McCartney, or McCartney's grantee. The lot was conveyed by Curran to McCartney July 1, 1861, and at that time the mortgage to Hand appeared on the record unsatisfied, and it does not appear that Curran made any covenants.

I have treated this question so far without regard to the facts occurring between the complainants and Smith since this suit was commenced, in regard to the redemption, &c.

Whatever the relative rights of the parties may have been upon the facts already referred to, it seems to be clear that Smith had none whatever upon the facts as they existed when the decree was entered.

Farrel had obtained his decree of foreclosure against Smith and Curran, and had sold the lot in satisfaction thereof. The only right remaining in Smith was a right to redeem according to the statute of Illinois, (Rev. Laws 1845, pp. 305, § 24, 303, § 13-16), by paying the sum for which the lot sold, with ten per cent interest, within twelve months; there was still a further right in judgment creditors to redeem for three months longer. Farrel had the right to a deed unless redemption was made within said fifteen months. There was no longer the relation of mortgagor and mortgagee—the relation was one created by the statute.

Manny, Drake & Downing, not having been made parties to the Farrel suit, and being subsequent mortgagees, were still possessed of an equity of redemption as against the Hand mortgage, and Farrel the purchaser. In order to enforce this right, they would have been compelled to file a bill to redeem, and after having advanced the money to protect their second mortgage, would have added the same to the sum due them on the two notes, and held the whole as a lien on the lot.

As a matter of economy to all parties, they bought the certificate of purchase from Farrell, and took an assignment of it, and thus they took the place of Farrell under the statute. If Smith redeemed, they would thus receive the money he was bound to pay, in any event; if he did not they would either have received a deed and become the owners or have held the same in trust, and as a security for the sum thus advanced.

It is not necessary to speculate on the rights of the parties in such a contingency, for Smith did redeem under the statute by paying to the Master in Chancery the prop-

er sum. Thereby he admitted his liability to pay the money, and he at the same time satisfied the decree and mortgage given to Hand. *It was effectually discharged.*

Subsequently, Manny, Drake & Downing being the assignees of Farrell and holders of the certificate of purchase, received the redemption money.

The true question is, can Smith under these circumstances compel Manny, Drake & Downing to refund the redemption money voluntarily paid? It needs no answer. The question suggests its own answer.

The answer of Smith proceeds upon the ground, that there is some equity arising upon these facts, by which he is to be subrogated to the rights of the holder of the certificate, the same as if it was assigned.

The effect of a redemption is to remove and discharge the sale and decree.

The answer of Smith seems to proceed also upon the ground that the doctrine of tacking mortgages has some application, but there is no analogy whatever.

If there were any equities by which such sum could be charged against Curran or his assignees, the defendant Smith cannot avail himself of them, because he has stated his ground of defence in the answer, and he must stand or fall by the pleadings.

3. *The court below allowed as a sett off for all paper actually delivered, and there was no claim for any other allowance.*

While I think the claim for whatever balance there was due by Curran to Bradner, Smith & Co., was to be recovered by suit against Curran, who disputed the amount of

the bill, yet I do not propose to press that point in this court.

The evidence taken by depositions, of Manny, Drake, Curran, George C. Smith and John B. Smith, with the exhibits, relate almost exclusively to the question of set off, or payment under the contract between Curran and Bradner, Smith & Co., and as we make no point upon that matter it is not necessary to notice such evidence.

It is sufficient to state that the court below allowed every dollar claimed by the defendant Smith, and only entered a decree in favor of the complainants for the amount admitted by Smith to be due.

I have so far referred to this case as if there was only a bill to foreclose a mortgage, and have ignored the fact that there was a cross bill, and answer thereto. I am aware that the decree entered seems to refer to the cross bill, and grant relief thereunder rather than to the original bill. I anticipate a claim by the counsel for the appellee, that the cross bill, &c., will sustain the decree. I will call the attention of your Honors to the cross bill, answer, and evidence to show that the errors already pointed out are not removed or avoided.

4. *The cross bill and answer does not change the aspect of the case already presented.*

While an original bill and cross bill may be and usually

are heard together, yet they are separate suits. A cross bill may be filed in another court. Each suit may be heard separately. The evidence taken in the original, and passed publication, cannot be read in support of the cross bill. The proceedings in the two suits cannot be blended so as to support a decree, but the decree must be referred and sustained entirely by the pleadings and evidence in one case or the other, or both.

Having shown that the decree was not rendered in conformity to the pleadings and evidence in the original suit, it remains to consider whether it was proper in the cross suit.

The only pleadings in the cross suit were the bill and answer. There was no replication to the answer, and no issue upon which evidence could be taken. All the testimony that was taken appears to be in the original suit.

Therefore, it is only necessary to examine the cross bill and answer thereto. In doing so, it is to be remembered, that the statements of the answer are to be regarded as true.

Before asking the attention of the court to the allegations of the cross bill and answer, I remark, that the case is not varied in any material respect, if we suppose a replication to have been filed, and the evidence read in the cross suit as well as the original.

The cross bill states the conveyance by Curran to McCartney, July 1, 1861, the execution of a warranty deed by McCartney to Smith, Feb 2, 1863, with covenant against all incumbrances, except the mortgage to Curran to secure $3,000, which the answer admits.

The cross bill avers that at the time of the conveyance by McCartney to Smith, there was, in fact, a prior lien and incumbrance to the mortgage to Curran, to-wit, a mortgage given by Curran to Hand, August 31, 1859, to secure $600, which had never been paid or released, which was recorded; that upon the records there appeared a release purporting to be signed by Hand, which was a forgery, but was not known to be such when McCartney conveyed to Smith; that the note was assigned by Hand to Farrel, who, in April, 1864, commenced a suit in the Recorder's Court against Smith, and to set aside the release and foreclose the mortgage; that a decree was rendered declaring the release a forgery, and ordering the amount due to be paid, and apointed a Master to sell the lot; that the lot was sold to Farrel for $714.44 by the Master, who issued a certificate of purchase to the purchaser, reciting, among other things, that if the premises were not redeemed before December 2, 1865, he would be entitled to a deed; and that such certificate was assigned to Manny, Drake and Downing, but whether for a good consideration or not, the complainant did not know.

The answer admitted, substantially, all of these statements, *except that in regard to the forgery of the release*, and avers that the respondents paid $786.46 to Farrel for the certificate of purchase; that such purchase was made in good faith and upon the actual payment of said sum, for the purpose of holding the same according to the terms of

the certificate; *the respondents further say that they had no knowledge, or information and belief, as to the statements in the cross bill in regard to the existence of the mortgage as a prior incumbrance, or the alleged forgery of the release*, except so far as the facts are shown by the proceedings in the Recorder's Court.

The cross bill states that after sale and delivery of the certificate of purchase, and before expiration of the time of redemption, the complainant Smith, being the owner in fee, as such owner redeemed the same from the sale by paying $792.48 to the Master, who thereupon gave him a certificate of redemption, which is recorded, and avers that he did not intend to discharge the premises from the mortgage, but that it should continue a lien until he was re-imbursed, and that the respondents had received the benefit of the redemption money.

The answer admits these allegations, except as to the intent of Smith in redeeming, which is denied; the answer admits the receipt of the redemption mo. ey by respondents.

The cross bill further states that when the forgery of the release was discovered, McCartney was insolvent, and action on his warranty would be unavailing.

The answer denies any knowledge or information as to these matters.

The cross bill then sets up the contract between Carran and Bradner, Smith & Co., of Feb. 2, 1863, in regard to the delivery of wrapping paper to discharge the notes for $3,000, substantially the same as in the answer to the original bill; and avers that the notes were not assigned by

Curran to Manny, Drake & Downing until after due, and were taken as collateral security for an old indebtedness.

All these statements are denied by the answer, and they aver the purchase of the notes for the amount due on them.

The averments of the original bill are then stated in the cross bill.

The cross bill does not pray that the complainant be allowed to redeem, but asks that the complainants in the original bill be restrained from foreclosing and from selling the premises for the payment of their pretended claim and for general relief.

Upon this state of facts, I insist that there was not enough to justify the decree.

The amonnt paid by Smith to redeem from the sale under the Farrel decree, was deducted from the amount due on the two notes. This could not be done, because—

1st. The existence of the Hand mortgage, or of the forgery of the release, was not admitted. Even if there had been an issue, it was not proved by any competent evidence, as against Manny, Drake & Downing.

2d. There is nothing to charge Curran, or Manny, Drake & Downing, with the consequences of the existence of the Hand mortgage or the forgery.

3d. Smith voluntarily redeemed and removed the incumbrance arising from the sale to Farrel, as owner of the lot.

4th. There is no principle of equity which will entitle Smith to charge over the money so paid to redeem, to Manny, Drake & Downing.

The amount due Bradner, Smith & Co., for paper delivered to Curran, could not be deducted from the amount due on the notes, because—

The existence of such a contract, delivery of paper, and indebtedness therefor, are all denied in the answer, and its statements stand as true.

The relief allowed by the decree was not in accordance with the prayer of the cross bill.

5. *The decree should have been one of foreclosure in the original suit, and not one allowing a redemption in the cross suit.*

As before suggested, the plaintiffs were entitled, in any event, to a decree against the maker of the notes, McCartney, for the amount due thereon, and to charge such sum as was equitable against the lot in Smith's hands.

There was no occasion for a cross bill, because Smith could be fully protected in the original suit. It was not put in to redeem, but to restrain and remove a cloud, upon the theory that nothing whatever was due to the complainants in the original bill.

After the evidence was taken, it was apparent that the original complainants were entitled to a decree for something, and after that time no attention was paid to the cross bill, until the decree was rendered. This accounts for the absence of a replication to the answer to the cross bill, and the absence of all evidence in support of the cross bill.

Notwithstanding the decree was entered as if there had been a failure to sustain the issues in the original

suit, and as if the cross suit had been successfully maintained. In this there was error.

6. I insist that there was error by the court below, in refusing to enter a decree against McCartney for the full amount of the principal and interest of the two notes described in the original bill, and in abating from the lien on the lot the sum paid by Smith to remove and redeem from a prior mortgage.

W. C. GOUDY,

Counsel for Appellant.